(1)

90-504

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FLEET FACTORS CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

CERCLA, the federal Superfund statute, imposes strict liability for environmental response costs on the owner or operator of a facility. Congress included an express exemption for a secured lender who holds "indicia of ownership" to protect its security interest but does not participate in the management of the borrower's facility.

Is a secured lender liable under CERCLA for environmental response costs incurred at the borrower's facility, despite the statutory exemption for secured lenders, where the lender neither took legal title to any of the borrower's property, nor participated in the day-to-day management of the facility?

PARTIES IN THE ELEVENTH CIRCUIT

The caption of this Petition contains the names of all the parties to this action in the Eleventh Circuit. Fleet Factors Corp. is a wholly-owned subsidiary of Fleet/Norstar Financial Group, Inc. Neither Fleet Factors Corp. nor its parent have any corporate affiliates other than wholly-owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Fleet Factors Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on May 23, 1990.

OPINIONS BELOW

The Eleventh Circuit opinion is reported at 901 F.2d 1550 (11th Cir. 1990), and is attached as Appendix A to this Petition. The opinion of the United States District Court for the Southern District of Georgia is reported at 724 F. Supp. 955 (S.D.Ga. 1988), and is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Eleventh Circuit was entered on May 23, 1990. The Eleventh Circuit's Order, affirming in part and reversing in part the district court's decision, is attached as Appendix C. A timely petition for rehearing and suggestion for rehearing *in banc* was filed on June 12, 1990, and was denied by the Eleventh Circuit in

an Order dated July 17, 1990, attached as Appendix D. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) (West Supp. 1990).

STATUTE INVOLVED

Section 107(a) of CERCLA, 42 U.S.C.A. § 9607(a) (West Supp. 1990) provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel . . . or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> [subparagraphs (3) and (4) omitted]
>
> shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> [subparagraphs (C) and (D) omitted]

The definition of owner or operator states that "[s]uch term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." CERCLA § 101(20)(A), 42 U.S.C.A. § 9601(20)(A) (West Supp. 1990) (the "secured lender exemption").

STATEMENT OF THE CASE

Petitioner Fleet Factors Corp. ("Fleet") entered into an agreement in 1976 with Swainsboro Print Works ("SPW"), a textile finishing company, pursuant to which Fleet advanced funds to SPW, and obtained as collateral a security interest in SPW's accounts receivable, inventory, fixtures, and equipment. Fleet also obtained a deed to secure debt on SPW's facility and real property in Emanuel County, Georgia.

In 1979, SPW filed a petition under Chapter XI of the Bankruptcy Act. Fleet continued to make secured loans to SPW pursuant to bankruptcy court approval. In early 1981, SPW ceased operations. Later that year SPW was adjudicated a bankrupt and the bankruptcy court appointed a trustee to supervise liquidation of SPW's assets.

In May 1982, Fleet obtained bankruptcy court approval to foreclose on its security interests covering SPW's inventory and equipment. Fleet engaged a firm of auctioneers, which conducted a public auction in June 1982. Fleet itself did not bid at this auction. The inventory and equipment was sold "as is" and "in place." Fleet never foreclosed on its deed to secure debt on SPW's real property and never took legal title to SPW's facility.

Eighteen months after the auction sale, the Environmental Protection Agency ("EPA") entered the SPW facility, and removed a number of drums and asbestos-containing materials from the plant and disposed of them. In 1987, Respondent the United States, filed suit against Fleet, alleging that Fleet was liable under § 107(a) of CERCLA, 42 U.S.C.A. § 9607(a) (West Supp. 1990), for response costs incurred by the EPA in removing the materials from the facility. The United States claimed Fleet was liable as either a present owner and operator of the facility, or the owner or operator of the facility

at the time the wastes were disposed. Fleet denied all liability on the ground, among others, that it was within the secured lender exemption. The United States and Fleet filed cross-motions for summary judgment.

The district court denied both motions for summary judgment, but *sua sponte* certified its decision for interlocutory appeal to the Eleventh Circuit (under 28 U.S.C.A. § 1292(b) (West Supp. 1990)). Fleet petitioned for leave to appeal the district court's denial of its summary judgment motion, which the Eleventh Circuit granted. The appeal was argued on October 30, 1989 before a panel consisting of Circuit Judges Vance and Kravitch and Senior District Judge Lynne, of the U.S. District Court for the Northern District of Alabama, sitting by designation. Judge Vance was assassinated in December 1989, and this case was decided by Circuit Judge Kravitch and District Judge Lynne.

The panel affirmed in part and reversed in part the district court decision, and examined three different periods in the relationship of Fleet and SPW:

> *1976 to February 1981*: This is the period from Fleet's first loans to SPW to the time SPW ceased operations. The Eleventh Circuit held, in agreement with the district court, that Fleet had no liability for its actions during this time.
>
> *February 1981 to June 1982*: This is the period after SPW ceased operations but before Fleet foreclosed its security interests in SPW's inventory and equipment. The Eleventh Circuit, reversing the district court, held that the allegations by the United States would be sufficient, if proven, to hold Fleet liable. It is this holding that is the focus of this petition for certiorari.
>
> *June 1982 to December 1983*: This is the period between Fleet's foreclosure on SPW's inventory and equipment and the time a private contractor left the facility. The Eleventh Circuit agreed with the dis-

trict court that there were genuine issues of fact for trial with respect to this period.

The focus of this petition is the point on which the Eleventh Circuit reversed the district court—that is, whether Fleet could be held liable on any correct reading of the secured lender exemption for its actions after SPW ceased operations but before Fleet foreclosed its security interests in SPW's inventory and equipment. This issue warrants review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION DISRUPTS NORMAL AND PRUDENT COMMERCIAL PRACTICES

The issue of the scope of secured lender liability under CERCLA is of extraordinary importance to commercial law. The Eleventh Circuit's broadening of potential CERCLA liability for secured lenders is disrupting commercial practices, and causing great concern in both the lending and business community.

The Circuit Court's holding makes it extremely difficult for financial institutions to determine how they can protect their secured loans without incurring massive liability. Financial institutions, small businesses, and the United States economy are at risk of suffering from the detrimental effects of increased lender wariness due to this uncertainty.

It is important for this Court to clarify the reach of the CERCLA liability scheme as it relates to lenders so as to bring certainty back into commercial practices. The decision below explicitly rejects the line of cases regarding the CERCLA secured lender exemption on which financial institutions have been relying. (*United States v. Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985); *United States v. Maryland*

Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 561 (W.D. Pa. 1989)). Financial institutions therefore look with confusion to the leading appellate court decision addressing the secured lender exemption.

The only other circuit court case addressing the exemption is in tension with *Fleet Factors*. *In re Bergsoe Metal Corp.*, No. 89-35397 (9th Cir. Aug. 9, 1990) (LEXIS, Genfed library, Courts file). In that case, the Ninth Circuit refuses to go as far as the Eleventh Circuit in finding secured lenders responsible for the cost of hazardous waste removal. The Ninth Circuit in *Bergsoe Metal* emphasizes the necessity for actual management of the facility before incurring liability, stating that "whatever the precise parameter of 'participation,' there must be some actual management of the facility before a secured lender will fall outside the exception. . . . Merely having the power to get involved in management, but failing to exercise it, is not enough." *Id.* at 10. The Ninth Circuit's emphasis on actual involvement contrasts with the *Fleet Factors* rule that the inference that the lender had the ability to influence decisions regarding hazardous waste is enough to hold the lender liable. The conflicting messages of these two Circuit Court decisions exacerbate the confusion of the business and lending community.

The decision below is making the already wary banking industry even more reluctant to lend to many borrowers, not just those who present obvious environmental liability problems, and less willing to help troubled borrowers through difficult financial times. Inhibited financial transactions and modified lending practices will reduce the supply and increase the cost of capital for many borrowers. Old industrial property is likely to remain abandoned and unused for fear of environmental liability. Increased caution on lenders' part will probably result in more bankruptcies, since helping a borrower over-

come financial difficulties will seldom be worth the risk of cleanup liability, considering the unpredictable scope of CERCLA damages. In fact, if courts attempt to follow the holding of the Eleventh Circuit, lenders will be liable in countless unpredictable situations.

Although in some cases it would be appropriate to let an issue percolate further in the lower courts before this Court's consideration, the decision below is causing such disruption to commercial practices and potential harm to the nation's economy that it warrants this Court's review at the present time.

II. THE ELEVENTH CIRCUIT'S DECISION CREATES A NEW CLASS OF LIABILITY THAT WAS NEVER INTENDED BY CONGRESS

The panel announced a new standard for secured lender liability under CERCLA:

> Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, *without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.* It is *not necessary* for the secured creditor actually to involve itself in the *day-to-day operations* of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. *Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste.*

App. A at 13a-14a (notes omitted, emphasis added). This novel holding creates a new category of CERCLA liability and warrants review by this Court.

The result of the decision below is to create a new class of liable parties under § 107(a)(2): a secured lender can become liable without any participation in the day-to-day operations of the facility, merely because the lender holds indicia of ownership to protect its security

interest. This is the result opposite that intended by the words of the statute and previous case law.

The Eleventh Circuit's interpretation of CERCLA turns the statute on its head by using the exemption to subject lenders to liability rather than to shield lenders from liability. Ironically, the court below bases Fleet's liability on the very language—"participating in management"—that is intended to protect secured lenders from such liability. Congress did not intend for the secured lender exemption to operate as an independent means of imposing liability on secured lenders.

The Eleventh Circuit acknowledges that its holding imposes new liabilities on secured lenders: "[C]reditors' awareness that they are potentially liable under CERCLA will encourage them to . . . insist upon compliance with acceptable treatment standards . . . ." App. A at 15a. Rather than protect secured lenders, as Congress intended, the decision below places lenders in an impossible position. If a lender "insist[s] upon compliance with acceptable treatment standards," then it may be liable because it has participated in management. On the other hand, if it does *not* insist on acceptable standards, the lender may nonetheless be liable if the court determines that it *could* have affected hazardous waste disposal decisions.

The increased involvement encouraged by the Eleventh Circuit is exactly the type of conduct that, according to its holding, would cause a secured lender to "anticipate losing its exception from CERCLA liability." The Eleventh Circuit welcomes this result on the ground that it gives lenders a "strong incentive to address hazardous waste problems", but under this vague standard secured lenders, as a practical matter, always will be liable for CERCLA clean-up costs. In other words, it renders meaningless the secured lender exemption. The Eleventh Circuit's "inference" test requires only that a secured lender:

> participat[e] in the *financial management* of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes. . . . [A] secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it *could* affect hazardous waste disposal decisions *if it so chose.*

App. A at 14a (emphasis added).

The inference test, by its terms, applies only in situations in which a lender has *not* been involved in the borrower's hazardous waste decisions. In such situations the lender's liability turns on purely hypothetical facts and inferences that the lender *could* have influenced the borrower's disposal of hazardous substances. Inferences about hypothetical facts serve as inadequate raw materials for constructing principled judicial decisions and for rational decision-making by lenders. Moreover, the inference test fashioned by the Eleventh Circuit will in virtually all instances be satisfied, if not by the rights and powers afforded to lenders under typical commercial loan agreements, then surely by the conduct of lenders that the Eleventh Circuit's opinion expressly encourages.

A lender possesses the ability to set the terms, financial and otherwise, under which it will make a loan or offer financial accommodations to a borrower. A lender may condition the loan or financial accommodation on the borrower's compliance with applicable laws in general and environmental laws in particular. Commercial loan agreements commonly and prudently include covenants requiring borrowers to comply strictly with all laws and regulations that relate to or impact upon the borrower or its business and assets, including environmental laws. They also include financial covenants and standards that provide significant financial and operational restraints upon the borrower and its operations. Such provisions are required, and in the marketplace are freely granted by contract, to enable secured lenders to protect their loan positions and the security interests and liens held by

them in their borrowers' assets. Yet this same control creates a "capacity to influence" the borrower and its decisions so as to subject the secured lender to CERCLA liability under the inference test adopted by the Eleventh Circuit.

III. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH ESTABLISHED LEGAL PRINCIPLES OF LENDER LIABILITY

The Eleventh Circuit's decision is inconsistent with established legal principles of lender liability, which permit lenders to exercise significant financial control over borrowers without exposing lenders to third-party liability and other similar adverse results as long as the lenders do not exercise power or control over borrowers' day-to-day management decisions. To the extent that the panel's decision is inconsistent with established legal principles, the opinion leaves secured lenders without guidance as to the scope of proper conduct and exposes secured lenders to substantial third-party liability and related risks should they follow the lower court's encouragement.

A. Lenders Are Entitled To Exercise Financial Control Over Borrowers' Affairs

Courts have expressly recognized the appropriateness of lenders' influencing and even controlling the financial affairs of borrowers without incurring third-party liability or other similar penalties as a result of such control. By so doing, courts have acknowledged that financial control by a lender is an accepted practice in lending transactions and have established standards for appropriate lender behavior and actions. For example, a lender's control of a borrower's financial affairs by reducing the amount of indebtedness advanced to the borrower and eventually selling inventory has been held not to constitute "control" of the type justifying equitable subordination of the lender's claims. *In re Clark Pipe & Supply*

Co., Inc., 893 F.2d 693, 701 (5th Cir. 1990) (quoting in part *In re Teltronics Services, Inc.*, 29 Bankr. 139, 172 (Bankr. E.D.N.Y. 1983) (emphasis added)).

The propriety and prevalence of lenders' carefully controlling the financial affairs of borrowers was also recognized and approved in *John G. Lambros Co., Inc. v. Aetna Casualty & Surety Co.*, 468 F. Supp. 624, 628 (S.D.N.Y. 1979) (holding that intimate involvement in a borrower's financial affairs does not expose a lender to contract liability on the obligations of the borrower) (quoting in part *Stowers v. Mahon*, 526 F.2d 1238, 1256 (5th Cir. 1976), *cert. denied*, 429 U.S. 834 (1976)).

To impose CERCLA liability for the type of financial control which is accepted practice in the lending industry is a departure from established law and is inconsistent with Congress' intent in establishing the secured lender exception to CERCLA liability.

B. An Adequate Body of Law Exists for Determining the Point at Which a Lender's Participation in Management Should Subject it to Liability

Although courts have allowed lenders to become intimately involved in the financial affairs of borrowers, they have consistently and appropriately subjected lenders to liability when they become excessively involved in the management of a borrower's business operations. *See Fury Imports, Inc. v. Shakespeare Co.*, 554 F.2d 1376 (5th Cir. 1977), *cert. denied*, 450 U.S. 921 (1981) (articulating the elements of a prima facie case for tortious interference under New York law); *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973) (describing lender liability under an "instrumentality" theory); *A. Gay Jenson Farms Co. v. Cargil, Inc.*, 309 N.W.2d 285 (Minn. 1981) (holding borrower constituted an agent of the lender). Each of these decisions, like the larger body of case authority of which it is a part, evidences a strong and con-

sistent policy of discouraging lenders from becoming intimately involved in the day-to-day business decisions and operations of borrowers.

In *In re Clark Pipe & Supply Co., Inc.*, the court held that because a lender had not exercised excessive control over the borrower's business, its claims would not be subordinated in bankruptcy. *In re Clark Pipe & Supply Co., Inc.*, 893 F.2d at 702. However, in reaching that decision the court recognized the potential for subordination stating:

> The purpose of equitable subordination is to distinguish between the unilateral remedies that a creditor may properly enforce pursuant to its agreements with the borrower and other inequitable conduct such as . . . the exercise of such total control over the borrower as to have essentially replaced its decision-making capacity with that of the lender. The crucial distinction . . . [is] between the existence of 'control' and the exercise of that 'control' to direct the activities of the borrower.

Id. at 701. *Cf. A. Gay Jenson Farms Co. v. Cargil*, 309 N.W.2d 285 (Minn. 1981) (lender which controls a borrower's business operations liable as principal for the acts of its borrower).

Thus, an adequate body of law exists for determining where a lender steps over the line of proper involvement in a borrower's affairs to incur liability. Surely it is this type of management control which Congress had in mind when it provided that "participat[ion] in management" is sufficient to remove a lender from the secured lender exemption. Applying this existing body of law to CERCLA, even if Fleet *were* an "owner," by virtue of its security deed, it nevertheless did not exercise the "participation in managment" necessary to be held liable under the statute.

C. The Eleventh Circuit's Approach Exposes Lenders to Substantial Risk Under Other Doctrines of Lender Liability

The Eleventh Circuit demands that lenders control the environmental waste operations of borrowers at a level that courts have previously held sufficient to create liability. The Eleventh Circuit stated:

> [o]ur ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential borrowers.
>
> * * * *
>
> . . . [This potential liability] will encourage them to monitor the hazardous waste treatment systems and policies of their borrowers and insist upon compliance with acceptable treatment standards . . . . Once a secured creditor's involvement with a facility becomes sufficiently broad that it can anticipate losing its exemption from CERCLA liability, it will have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard.

App. A at 15a-16a. However, the court does not address the various doctrines of lender liability under federal and state law which hold liable or otherwise penalize lenders that exercise excessive influence over the management decisions and operations of borrowers. If a lender fulfills the duties imposed by the Eleventh Circuit by becoming extensively involved in the borrower's management of environmental affairs, the lender will expose itself to a host of theories of lender liability.

Thus, lenders are placed in a very precarious situation, in which liability of some type and to some party is inevitable. If the lender fails to control a borrower's compliance with environmental laws it will incur CERCLA liability, while successful control of a borrower's behavior will lead to lender liability for other obligations

the borrower incurs. The cumulative effect of the Eleventh Circuit's decision is to leave commercial lenders in this country in abysmal uncertainty as to their responsibilities in environmental matters and as to the resolution of other conflicts inherent in their position as lenders. This Court should grant the writ of certiorari to resolve that uncertainty.

CONCLUSION

For the reasons stated in this Petition, Fleet Factors Corp. requests this Court to grant the writ of certiorari to review the judgment of the Eleventh Circuit.

Respectfully submitted,

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September 21, 1990

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-8094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FLEET FACTORS CORP.,
Defendant-Third Party
Plaintiff-Appellant,

CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants,

ROBERT KOLODNEY, ESQ., AS TRUSTEE OF
SWAINSBORO PRINT WORKS, INC.,
Debtor,
Third Party-Defendant.

Appeal from the United States District Court
for the Southern District of Georgia

May 23, 1990

Before VANCE* and KRAVITCH, Circuit Judges, and LYNNE**, Senior District Judge.

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* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

KRAVITCH, Circuit Judge:

Fleet Factors Corporation ("Fleet") brought an interlocutory appeal [1] from the district court's denial of its motion for summary judgment in this suit by the United States to recover the cost of removing hazardous waste from a bankrupt textile facility. The district court denied summary judgment because it concluded that Fleet's activities at the facility might rise to the level of participation in management sufficient to impose liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-57 (1982 & West Supp. 1988), despite the statutory exemption from liability for holders of a security interest. We agree with the district court that material questions of fact remain as to the extent of Fleet's participation in the management of the facility; therefore, we affirm the denial of Fleet's summary judgment motion.

FACTS

In 1976, Swainsboro Print Works ("SPW"), a cloth printing facility, entered into a "factoring" agreement with Fleet in which Fleet agreed to advance funds against the assignment of SPW's accounts receivable. As collateral for these advances, Fleet also obtained a security interest in SPW's textile facility and all of its equipment, inventory, and fixtures. In August, 1979, SPW filed for bankruptcy under Chapter 11. The factoring agreement between SPW and Fleet continued with court approval. In early 1981 Fleet ceased advancing funds to SPW because SPW's debt to Fleet exceeded Fleet's estimate of the value of SPW's accounts receivable. On February 27, 1981, SPW ceased operations and began to liquidate its inventory. Fleet continued to collect on the accounts receivable assigned to it under the

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[1] This court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(b).

Chapter 11 factoring agreement. In December, 1981, SPW was adjudicated a bankrupt under Chapter 7 and a trustee assumed title and control of the facility.

In May, 1982, Fleet foreclosed on its security interest in some of SPW's inventory and equipment, and contracted with Baldwin Industrial Liquidators ("Baldwin") to conduct an auction of the collateral. Baldwin sold the material "as is" and "in place" on June 22, 1982; the removal of the items was the responsibility of the purchasers. On August 31, 1982, Fleet allegedly contracted with Nix Riggers ("Nix") to remove the unsold equipment in consideration for leaving the premises "broom clean." Nix testified in deposition that he understood that he had been given a "free hand" by Fleet or Baldwin to do whatever was necessary at the facility to remove the machinery and equipment. Nix left the facility by the end of December, 1983.

On January 20, 1984, the EPA inspected the facility and found 700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of material containing asbestos. The EPA incurred costs of nearly $400,000 in responding to the environmental threat at SPW. On July 7, 1987, the facility was conveyed to Emanuel County, Georgia, at a foreclosure sale resulting from SPW's failure to pay state and county taxes.

The government sued Horowitz and Newton, the two principal officers and stockholders of SPW, and Fleet to recover the cost of cleaning up the hazardous waste. The district court granted the government's summary judgment motion with respect to the liability of Horowitz and Newton for the cost of removing the hazardous waste in the drums. The government's motion with respect to Fleet's liability, and the liability of Horowitz and Newton for the asbestos removal costs was denied. Fleet's motion for summary judgment was also denied. The

district court, *sua sponte*, certified the summary judgment issues for interlocutory appeal and stayed the remaining proceedings in the case. Fleet subsequently brought this appeal challenging the court's denial of its motion for summary judgment.

STANDARD OF REVIEW

The District court's disposition of the summary judgment motion is reviewable de novo because it involves legal questions of statutory interpretation. *See Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1315-16 (11th Cir. 1990); *Hiram Walker & Sons v. Kirk Line, Inc.*, 877 F.2d 1508, 1513 (11th Cir. 1989); *Clemens v. Dougherty County, Ga.*, 684 F.2d 1365, 1368 (11th Cir. 1982). Under Fed.R.Civ.P. 56(c), summary judgment is only appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Allis Chalmers*, 893 F.2d at 1318. In evaluating a summary judgment motion, the burden of establishing the absence of a material dispute of fact is on the moving party; the court must view all evidence in the light most favorable to the non-movant and resolve all reasonable doubts about the facts in favor of the non-movant. *Id.; WBS-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

DISCUSSION

The Comprehensive Environmental Response Compensation and Liability Act was enacted by Congress in response to the environmental and public health hazards caused by the improper disposal of hazardous wastes. *United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573, 576 (D.Md. 1986); S.Rep. No. 848, 96th

Cong., 2d Sess. 2 (1980), U.S. Code Cong. & Admin. News 1980, p. 6119. The essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on "those responsible for problems caused by the disposal of chemical poison." *Allis Chalmers*, 893 F.2d at 1316; *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986). Accordingly, CERCLA authorizes the federal government to clean up hazardous waste dump sites and recover the costs of the effort from certain categories of responsible parties. *Maryland Bank & Trust Co.*, 632 F.Supp. at 576.

The parties liable for costs incurred by the government in responding to an environmental hazard are: 1) the present owners and operators of a facility where hazardous wastes were released or are in danger of being released; 2) the owners or operators of a facility at the time the hazardous wastes were disposed; 3) the person or entity that arranged for the treatment or disposal of substances at the facility; and 4) the person or entity that transported the substances to the facility. *Allis Chalmers*, 893 F.2d at 1317; 42 U.S.C. § 9607(a) (1982 & West Supp. 1988). The government contends that Fleet is liable for the response costs associated with the waste at the SPW facility as either a present owner and operator of the facility, *see* 42 U.S.C. § 9607(a)(1), or the owner or operator of the facility at the time the wastes were disposed, *see* 42 U.S.C. § 9607(a)(2).

The district court, as a matter of law, rejected the government's claim that Fleet was a present owner of the facility. The court, however, found a sufficient issue of fact as to whether Fleet was an owner or operator of the SPW facility at the time the wastes were disposed to warrant the denial of Fleet's motion for summary judg-

ment. On appeal each party contests that portion of the district court's order adverse to their respective interests.

A. Fleet's Liability Under Section 9607(a)(1)[2]

CERCLA holds the owner or operator of a facility containing hazardous waste strictly liable to the United States for expenses incurred in responding to the environmental and health hazards posed by the waste in that facility. *See* 42 U.S.C. § 9607(a)(1); S.Rep. No. 848, 96th Cong., 2d Sess. 34 (1980). This provision of the statute targets those individuals presently "owning

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[2] As an initial matter, we must consider whether this issue is properly before us on appeal. Fleet notes that the district court held that it was not liable as the present "owner or operator" of the facility and argues that its appeal did not challenge this aspect of the court's order. Rather, it only sought to appeal that part of the district court's order denying its motion for summary judgment. Fleet argues that a party is precluded from seeking reversal of an order, on an interlocutory appeal, if it did not properly petition for permission to appeal.

Fleet's position is meritless. When a district court certifies an order for appeal, all questions material to that particular order are properly before the court of appeals. *See United States v. Stanley*, 483 U.S. 669, 676-77, 107 S.Ct. 3054, 3060, 97 L.Ed.2d 550 (1987) (construing § 1292(b) interlocutory appeals to bring entire lower court order before appellate court, not just precise question certified).

Here, the district court's order clearly certifies this issue for interlocutory appeal. Even if construed otherwise, the district court expressly refused to limit its certification order to a specific issue. The district court's order states:

> I find that this order disposes of controlling questions of law concerning which there is substantial doubt, *including, but not limited to,* my construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition; my construction of the CERCLA provisions describing the classes of liable persons; and my construction of the scope of the third party defense to CERCLA liability.

United States v. Fleet Factors Corp., 724 F.Supp. 955, 962 (S.D.Ga. 1988) (emphasis added).

or operating such facilit[ies]." *See* 42 U.S.C. § 9601 (20)(A)(ii). In order to effectuate the goals of the statute, we will construe the present owner and operator of a facility as that individual or entity owning or operating the facility at the time the plaintiff initiated the lawsuit by filing a complaint.[3]

On July 9, 1987, the date this litigation commenced, the owner of the SPW facility was Emanuel County, Georgia. Under CERCLA, however, a state or local government that has involurtarily acquired title to a facility is generally not held liable as the owner or operator of the facility.[4] Rather, the statute provides that

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[3] Although the "owner and operator" language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts. *See Maryland Bank & Trust Co.*, 632 F.Supp. at 577-78; *see also Guidice v. BFC Electroplating and Manufacturing Co.*, 732 F.Supp. 556, 561 (W.D.Pa. Sept. 1, 1989) (interpreting statute in disjunctive); *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269, 1280 (D.Del. 1987) (same), *affirmed*, 851 F.2d 643 (3d Cir. 1988). Additionally, we note that § 9607(a)(2) is phrased in the disjunctive. We can perceive no rational explanation, other than careless statutory drafting, for imposing liability upon "owners *or* operators" under one section but only holding "owners *and* operators" liable under another section. *Cf. Coastal Casting Service v. Aron*, No. H-86-4463 (S.D.Tex. April 8, 1988) ("It is well known that CERCLA was hastily drafted and adopted, with resulting ambiguities . . .") (available on WESTLAW as 1988 WL 35012); *Maryland Bank & Trust Co.*, 632 F.Supp. at 578 ("The structure of section 107(a) [9607(a)], like so much of this hastily patched together compromise Act, is not a model of statutory clarity."). Our construction of both statutory provisions in the disjunctive is further supported by the fact that the definitional section of the statute only refers to the phrase "owner or operator." *See* 42 U.S.C. § 9601(20)(A).

[4] CERCLA does provide that a state or local government will be liable under these circumstances when it "has caused or contributed to the release or threatened release of a hazardous substance from the facility . . ." 42 U.S.C. § 9601(20)(D). This exception, however, is not applicable here.

> in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, [its owner or operator is] any person who owned, operated or otherwise controlled activities at such facility immediately beforehand.

42 U.S.C. § 9601(20)(A)(iii).

Essentially, the parties disagree as to the interpretation of the phrase "immediately beforehand." The district court reasoned that Fleet could not be liable under section 9607(a)(1) because it had never foreclosed on its security interest in the facility and its agents had not been on the premises since December 1983. The government contends that the statute should be interpreted to refer liability "back to the last time that someone controlled the facility, however long ago." Appellee's Brief at 23. Thus, according to the government, the period of effective abandonment of the site by the trustee in bankruptcy (from December 1983 to the July 1987 foreclosure sale) should be ignored and liability would remain with Fleet since it was the last entity to "control" the facility.

We agree with Fleet that the plain meaning of the phrase "immediately beforehand" means without intervening ownership, operation, and control. Fleet, therefore, cannot be held liable under section 9607(a)(1) because it neither owned, operated, or controlled SPW immediately prior to Emanuel County's acquisition of the facility. It is undisputed that from December 1981, when SPW was adjudicated a bankrupt, until the July 1987 foreclosure sale, the bankrupt estate and trustee were the owners of the facility. Similarly, the evidence is clear that neither Fleet nor any of its putative agents had anything to do with the facility after December 1983. Although Fleet may have operated or controlled SPW prior to December 1983, its involvement with SPW terminated

more then three years before the county assumed ownership of the facility. The fact that the bankrupt estate or trustee may not have effectively exercised their control of the facility between December 1983 and July 1987 is of no moment. It is undisputed that Fleet was not in control of the facility during this period. Although a trustee can obviously abdicate its control over a bankrupt estate, it cannot in such a manner unilaterally delegate its responsibility to a previous controlling entity. To reach back to Fleet's involvement with the facility prior to December 1983 in order to impose liability would torture the plain statutory meaning of "immediately beforehand." [5]

B. Fleet's Liability Under Section 9607(a)(2)

CERCLA also imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any . . . facility at which such hazardous substances were disposed of. . . ." 42 U.S.C. § 9607(a)(2). CERCLA excludes from the definition of "owner or operator" any "person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(A). Fleet has the burden of establishing its entitlement to this exemption. *Maryland Bank & Trust*, 632 F.Supp. at 578; *see United States v. First City National Bank of Houston*, 386 U.S. 361, 366, 87 S.Ct. 1088, 1092, 18 L.Ed.2d 151 (1967). There is no dispute that Fleet held an "indicia of ownership" in the facility through its deed of trust to SPW,

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[5] This interpretation of § 9607(a)(1) is particularly appropriate in the context of the entire statutory scheme. While § 9607(a)(1) targets present owners and operators of toxic waste facilities, § 9607(a)(2) focuses on the entities that owned or operated the facility at the time the wastes were disposed. A narrow reading of this section would not, therefore, create an unintended loophole for individuals or entities to escape liability for improperly disposing hazardous waste.

and that this interest was held primarily to protect its security interest in the facility. The critical issue is whether Fleet participated in management sufficiently to incur liability under the statute.[6]

The construction of the secured creditor exemption is an issue of first impression in the federal appellate courts. The government urges us to adopt a narrow and strictly literal interpretation of the exemption that excludes from its protection any secured creditor that participates in any manner in the management of a facility. We decline the government's suggestion because it would largely eviscerate the exemption Congress intended to afford to secured creditors. Secured lenders frequently have some involvement in the financial affairs of their debtors in order to insure that their interests are being adequately protected. To adopt the government's interpretation of the secured creditor exemption could expose all such lenders to CERCLA liability for engaging in their normal course of business.

Fleet, in turn, suggests that we adopt the distinction delineated by some district courts between permissible participation in the financial management of the facility and impermissible participation in the day-to-day or oper-

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[6] The government correctly formulates this issue as being comprised of two distinct, but related, means of finding Fleet liable under § 9607(a)(2). First, Fleet is liable under the statute if it operated the facility within the meaning of the statute. Alternatively, Fleet can be held liable if it had an indicia of ownership in SPW and managed the facility to the extent necessary to remove it from the secured creditor liability exception. *See United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 20-21 (D.R.I. 1989). Although we can conceive of some instances where the facts showing participation in management are different from those indicating operation, this is not such a case. The sum of the facts alleged by the government is sufficient to hold Fleet liable under either analysis. In order to avoid repetition, and because this case fits more snugly under a secured creditor analysis, we will forgo an analysis of Fleet's liability as an operator.

ational management of a facility. In *United States v. Mirabile*, the first case to suggest this interpretation, the district court granted summary judgment to the defendant creditors because their participation in the affairs of the facility was "limited to participation in financial decisions." No. 84-2280, slip op. at 3 (E.D.Pa. Sept. 6, 1985) (available on WESTLAW as 1985 WL 97). The court explained "that the participation which is critical is participation in operational production, or waste disposal activities. Mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability." *Mirabile*, No. 84-2280, slip op. at 4; *accord United States v. New Castle County*, 727 F.Supp. 854, 866 (D.Del.1989); *Rockwell International v. IU International Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill. 1988); *see also Coastal Casting Service v. Aron*, No. H-86-4463, slip op. at 4 (S.D.Tex. April 8, 1988) (available on WESTLAW as 1988 WL 35012) (complaint alleging that secured creditor's entanglement with facility's management surpassed mere financial control held sufficient). The court concluded that "before a secured creditor . . . may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site. [Here, the creditor] . . . merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation."[7] *Id.* at 12; *accord United States*

[7] The court permitted a secured creditor to secure a facility against vandalism by boarding up windows and changing locks, make inquiries as to the cost of disposing of various drums of toxins, visit the property in order to show it to prospective purchasers, monitor its cash collateral accounts, ensure that receivables went to the proper accounts, and establish a reporting system between the facility and the bank. *Mirabile*, No. 84-2280, slip op. at 5, 8. The court suggested that activities which might bring a secured creditor outside the protection of the exception included determining the order in which orders were filled, demanding additional sales from the facility, supervising the operations of the facility, and insisting on certain manufacturing changes and reassignment of personnel. *Id.* at 8.

v. Nicolet, Inc., 712 F.Supp. 1193, 1204-05 (E.D.Pa. 1989).

The court below, relying on *Mirabile*, similarly interpreted the statutory language to permit secured creditors to

> provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

United States v. Fleet Factors Corp., 724 F.Supp. 955, 960 (S.D. Ga. 1988); *accord Guidice*, at 561-62 [8]; *Nicolet*, 712 F.Supp. at 1205. Applying this standard, the trial judge concluded that from the inception of Fleet's relation with SPW in 1976 to June 22, 1982, when Baldwin entered the facility, Fleet's activity did not rise to the level of participation in management sufficient to impose CERCLA liability. The court, however, determined that the facts alleged by the government with respect to Fleet's involvement after Baldwin entered the facility were sufficient to preclude the granting of summary judgment in favor of Fleet on this issue.

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[8] In *Guidice*, the district court applied this analysis to exempt a bank from CERCLA liability because the bank's activities with respect to the facility were directed at protecting its security interest rather than controlling the facility's operational, production, or waste disposal activities. At 561-62. The bank's involvement with the facility included meetings where it was informed of the status of the facility's accounts, personnel changes, and the presence of raw materials; assistance in procuring a loan from another lender; communicating with local officials to assist the facility with wastewater discharge compliance; inspecting the property after it ceased operations; efforts to restructure the facility's loans; and an agreement to provide financing if a particular party purchased the facility at a foreclosure sale. *Id.* at 562.

Although we agree with the district court's resolution of the summary judgment motion, we find its construction of the statutory exemption too permissive towards secured creditors who are involved with toxic waste facilities. In order to achieve the "overwhelmingly remedial" goal of the CERCLA statutory scheme,[9] ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities. *Allis Chalmers*, 893 F.2d at 1317; *see Maryland Bank & Trust Co.*, 632 F.Supp. at 579 (secured creditor exemption should be construed narrowly); Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 Hastings L.J. 1261, 1285-86, 1291 (1987) (same) [hereinafter *Claims Against Lenders*]. The district court's broad interpretation of the exemption would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability. This construction ignores the plain language of the exemption and essentially renders it meaningless. Individuals and entities involved in the operations of a facility are already liable as operators under the express language of section 9607(a)(2). Had Congress intended to absolve secured creditors from ownership liability, it would have done so. Instead, the statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of a facility.

Although similar, the phrase "participating in the management" and the term "operator" are not congruent. Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator,[10] by participating in the financial management

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[9] *Allis Chalmers*, 893 F.2d at 1317; *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

[10] For an example of activity that could subject a secured creditor to liability as an operator, *see Kayser-Roth Corp.*, 724 F.Supp. at 22-23.

of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.[11] We, therefore, specifically reject the formulation of the secured creditor exemption suggested by the district court in *Mirabile*. *See*, No. 84-2280, slip op. at 4.

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[11] This narrow construction of the secured creditor exemption is supported by the sparse legislative history on the subject. The Senate version of CERCLA initially lacked an exemption for secured creditors in its definition of "owner or operator." *See* S. 1480, 97th Cong., 2d Sess., *reprinted in* 2 Senate Comm. on Environmental and Public Works, 97th Cong., 2 Sess., 1 *A Legislative History of the CERCLA* 470 (Comm. Print 1983). Representative Harsha introduced the exemption to the bill that was finally passed stating:

> This change is necessary because the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate in the management or operation *and are not otherwise affiliated* with the person leasing or operating the . . . facility, to the liability provisions of the bill.

Remarks of Rep. Harsha, *reprinted in* 2 Senate Comm. on Environmental and Public Works, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA* 945 (Comm. Print 1983) (emphasis added). The use of the word "affiliated" to describe the threshold at which a secured creditor becomes liable clearly indicates a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator. It also suggests that the interpretation of the exemption intended by Congress is more consistent with the level of secured creditor involvement described in our opinion than with the management of day-to-day operations standard set forth in *Mirable*.

This construction of the secured creditor exemption, while less permissive than that of the trial court, is broader than that urged by the government and, therefore, should give lenders some latitude in their dealings with debtors without exposing themselves to potential liability. Nothing in our discussion should preclude a secured creditor from monitoring any aspect of a debtor's business. Likewise, a secured creditor can become involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability.

Our interpretation of the exemption may be challenged as creating disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems and encouraging secured creditors to distance themselves from the management actions, particularly those related to hazardous wastes, of their debtors. *See Guidice*, at 562; Note, *Interpreting the Meaning of Lender Management Under Section 101(20)(A) of CERCLA*, 98 Yale L.J. 925, 928, 944 (1989). As a result the improper treatment of hazardous wastes could be perpetuated rather than resolved. These concerns are unfounded.

Our ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.

Similarly, creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable

treatment standards as a prerequisite to continued and future financial support. *Claims Against Lenders, supra,* at 1294; Note, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA,* 1988 Wis.L.Rev. 139, 185 (1988) [hereinafter *Liability of Financial Institutions*].[12] Once a secured creditor's involvement with a facility becomes sufficiently broad that it can anticipate losing its exemption from CERCLA liability, it will have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard.

In *Maryland Bank & Trust Co.,* the court aptly described and weighed the competing policy interests of creditors and the government in interpreting the secured creditor exemption:

> In essence, the defendant's position would convert CERCLA into an insurance scheme for financial in-

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[12] One commentator notes that a narrow construction of the secured creditor exception

> conforms with CERCLA's implicit function of encouraging safer hazardous waste procedures. The possibility that CERCLA liability will depress the value of the security property provides economic incentive for lenders to guard against its misuse. Lending institutions are especially well-equipped for this function. They can require the borrower to submit to periodic environmental audits, either as a condition to receiving a loan or by an amendment to an existing agreement. Lenders can also require warranties from their borrowers guaranteeing that they are in full compliance with hazardous waste laws and regulations. . . . Ultimately, lenders can refuse to lend money to persons believed to be operating illegal or improper hazardous waste activities. While there is a clear risk that innocent borrowers will find it difficult to obtain credit because of the nature of their business, this result is consistent with CERCLA's general effect of spreading hazardous waste costs industry-wide.

Claims Against Lenders, supra, at 1294 (citations omitted); *see also Liability of Financial Institutions*], *supra,* at 183-85 (discussing lender strategies for decreasing liability risk under a narrow interpretation of the secured creditor exception).

> stitutions, protecting them against possible losses due to the security of loans with polluted properties. Mortgagees, however, already have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions, such research is routine. CERCLA will not absolve them from responsibility for their mistakes of judgment.

632 F.Supp. at 580 (citations omitted).

We agree with the court below that the government has alleged sufficient facts to hold Fleet liable under section 9607(a)(2). From 1976 until SPW ceased printing operations on February 27, 1981, Fleet's involvement with the facility was within the parameters of the secured creditor exemption to liability. During this period, Fleet regularly advanced funds to SPW against the assignment of SPW's accounts receivable, paid and arranged for security deposits for SPW's Georgia utility services, and informed SPW that it would not advance any more money when it determined that its advanced sums exceeded the value of SPW's accounts receivable.

Fleet's involvement with SPW, according to the government, increased substantially after SPW ceased printing operations at the Georgia plant on February 27, 1981 and began to wind down its affairs. Fleet required SPW to seek its approval before shipping its goods to customers, established the price for excess inventory, dictated when and to whom the finished goods should be shipped, determined when employees should be laid off, supervised the activity of the office administrator at the site, received and processed SPW's employment and tax forms, controlled access to the facility, and contracted with Baldwin to dispose of the fixtures and equipment at SPW. These facts, if proved, are sufficient to remove Fleet from the protection of the secured creditor exemption. Fleet's involvement in the financial management of

the facility was pervasive, if not complete.[13] Furthermore, the government's allegations indicate that Fleet was also involved in the operational management of the facility. Either of these allegations is sufficient as a matter of law to impose CERCLA liability on a secured creditor. The district court's finding to the contrary is erroneous.

With respect to Fleet's involvement at the facility from the time it contracted with Baldwin in May 1982 until Nix left the facility in December 1983, we share the district court's conclusion that Fleet's alleged conduct brought it outside the statutory exemption for secured creditors.[14] Indeed, Fleet's involvement would pass the

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[13] Generally, the lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement in the facility's financial management. Here, that inference is not even necessary because there was evidence before the district court that Fleet actively asserted its control over the disposal of hazardous wastes at the site by prohibiting SPW from selling several barrels of chemicals to potential buyers. As a result, the barrels remained at the facility unattended until the EPA acted to remove the contaminants.

[14] The district court summarized the government's allegations of Fleet's conduct at the facility during this period as follows:

> Plaintiff alleges that Baldwin moved the barrels that allegedly contained hazardous substances before Baldwin conducted the public auction. Plaintiff contends that after the auction, Baldwin auctioned some, but not all, of the machinery and equipment as is, and in place, and permitted the purchasers to remove the equipment and machinery that they had purchased. Plaintiff asserts that after the auction Fleet signed a document that permitted Nix to have access to the facility for 180 days and to remove any remaining machinery and equipment. . . . Plaintiff maintains that friable asbestos was knocked loose from the pipes connected to the machinery and equipment by either the purchasers of the equipment at the auction or Nix. Plaintiff alleges that the condition of the chemicals and the asbestos in the facility after Baldwin, Nix, and the purchasers concluded their business constituted an immediate risk to public health and the environment. . . .

Fleet Factors, 724 F.Supp. at 960-61. Fleet disputes these material facts. *Id.* at 961.

threshold for operator liability under section 9607(a)(2).[15] Fleet weakly contends that its activity at the facility from the time of the auction was within the secured creditor exemption because it was merely protecting its security interest in the facility and foreclosing its security interest in its equipment, inventory, and fixtures. This assertion, even if true, is immaterial to our analysis. The scope of the secured creditor exemption is not determined by whether the creditor's activity was taken to protect its security interest. What is relevant is the nature and extent of the creditor's involvement with the facility, not its motive. To hold otherwise would enable secured creditors to take indifferent and irresponsible actions toward their debtors' hazardous wastes with impunity by incanting that they were protecting their security interests. Congress did not intend CERCLA to sanction such abdication of responsibility.

CONCLUSION

We agree with the district court that Fleet is not within the class of liable persons described in section 9607(a)(1). We also conclude that the court properly denied Fleet's motion for summary judgment. Although the court erred in construing the secured creditor exemption to insulate Fleet from CERCLA liability for its con-

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[15] During oral argument, counsel for Fleet virtually conceded operator liability for its conduct with respect to the facility when he discussed Fleet's potential for liability were it to have fixed a hole in the roof of an SPW building:

JUDGE KRAVITCH: If [Fleet] finds in fixing the roof that there is some asbestos that is being dislodged can it just ignore that?

MR. GOOD: Once it fixes the roof, once it takes over control of fixing the roof, it has opened a potential pandora's box both as to that asbestos and anything else at that facility underneath it known and unknown.

JUDGE KRAVITCH: Why isn't that analogous to what happened here?

duct prior to June 22, 1982, it correctly ruled that Fleet was liable under section 9607(a)(2) for its subsequent activities if the government could establish its allegations. Because there remain disputed issues of material fact, the case is remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

APPENDIX B

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

No. CV 687-070

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FLEET FACTORS CORP.,
CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants.

FLEET FACTORS CORP.,
Third-Party Plaintiff,

vs.

ROBERT KOLODNEY, as Trustee in Bankruptcy of
Swainsboro Print Works, Inc.,
Third-Party Defendant.

December 22, 1988

Richard G. Leland, Mineola, N.Y., for Fleet Factors.

G. Stephen Manning, Dept. of Justice, Wash., D.C., for United States.

Charles R. Merrill, Swainsboro, Ga., for Clifford Horowitz.

Murray Newton, Severna Park, Md., pro se.

Before Dudley Brown, district judge.

ORDER

Before the Court are (1) plaintiff's motion for partial summary judgment on the issue of liability against defendants Clifford Horowitz ("Horowitz"), Murray Newton ("Newton"), and Fleet Factors Corporation ("Fleet"); and (2) defendant Fleet's motion for summary judgment. A motion hearing with oral argument was conducted August 11, 1988.

FACTS

I will summarize the facts as to which there is no genuine dispute. From approximately 1963 until February, 1981, Swainsboro Print Works, Inc. ("SPW"), or its predecessor in interest, operated a cloth printing facility on its premises in Swainsboro, Georgia. Defendants Clifford Horowitz and Murray Newton were the only shareholders of SPW at the time it ceased operations. They were actively involved in the management of SPW until that time. In 1976, SPW and Fleet entered into a factoring agreement in which Fleet agreed to advance funds against the assignment of SPW's accounts receivable. As collateral for these advances, Fleet also obtained a security interest in all of SPW's equipment, inventory, and fixtures. As additional collateral, Fleet was granted a security interest in the SPW plant or facility ("facility") evidenced by a deed to secure a debt conveying title to the realty. Although Fleet foreclosed on its security interest in some of SPW's inventory and equipment in May, 1982, Fleet never foreclosed on the real property. The facility was conveyed to Emanuel County, Georgia, on July 7, 1987, at a foreclosure sale resulting from SPW's failure to pay state and county taxes.

The financing arrangement between Fleet and SPW continued until August, 1979, when SPW filed for Chap-

ter 11 bankruptcy. Fleet continued to finance SPW as debtor-in-possession on similar terms pursuant to a court approved factoring agreement.

On February 27, 1981, SPW ceased operations at the facility. Just prior to that date, Fleet had advised SPW's principals that it would not advance additional funds to SPW because SPW's account already was over advanced, that is, SPW's debt to Fleet exceeded Fleet's estimate of the value of SPW's accounts receivable. SPW would down its operation by selling off some remaining inventory. Fleet continued to collect on the accounts receivable assigned to it under the chapter 11 factoring agreement. Subsequently, in December 1981, SPW was adjudicated a bankrupt under chapter 7 of the bankruptcy code, and a trustee was appointed to supervise the liquidation of assets. The trustee assumed the usual statutory powers and title to the debtor's property.

When SPW ceased operations, there were approximately 20-25 million yards of cloth at the facility. SPW had printed substantially all of the goods according to specific customers' orders. SPW retained a small crew of no more than 12 to 15 people to wind up the affairs of the company and to ship the remaining goods. During the liquidation of the remaining inventory, Fleet continued to check the credit of SPW's customers before SPW shipped the goods to the customers. This did not represent any change in Fleet's normal practice as a secured lender. SPW forwarded the funds it received to Fleet as partial payment for its post-chapter 11 debt.

After obtaining bankruptcy court approval in May, 1982, Fleet foreclosed on its security interest in some of SPW's inventory and equipment and contracted with Baldwin Industrial Liquidators, Inc. ("Baldwin") to conduct an auction and sell the inventory and equipment. Baldwin conducted a public auction on June 22, 1982, at which Baldwin sold some, but not all, of SPW's inventory and equipment for Fleet. Baldwin sold the collateral "as

is" and "in place", and removal was the responsibility of the purchasers.

On August 31, 1982, Clifford Greenside signed a document in his capacity as a representative of Fleet that permitted Nix Riggers ("Nix") to remove the un-sold equipment and the equipment that the purchasers had not removed after the public auction. As consideration for this right, the August 31, 1982, document directed Nix "to leave the premises in 'broom clean' condition." The August 31, 1982, document allowed Nix up to 180 days, which could be extended in writing, to complete the terms and conditions of that document. Nix left the facility in or around December 1983.

Although there is no genuine dispute concerning the foregoing facts, there is a genuine dispute concerning many of the events that surrounded the June 22, 1982, auction. Plaintiff contends that Baldwin moved fifty-five gallon drums away from the sales area before the auction. Plaintiff alleges that shortly before the auction the facility contained 400-500 leaking and rusting fifty-five gallon drums containing dyes and chemicals. Plaintiff asserts that the removal of equipment or machinery by Nix or purchasers of equipment at the auction disturbed asbestos that allegedly was on the pipes that were connected to the equipment or machinery.

In addition to disputing plaintiff's version of the events surrounding the auction and subsequent removal of the equipment and machinery at the facility, Fleet argues that plaintiff has not produced any credible evidence that the material around the pipes that were connected to the machinery and equipment was asbestos. Defendant alternatively contends that even if plaintiff incurred response costs for chemicals or asbestos that were in the facility when plaintiff conducted a site inspection on January 20, 1984, any improper disposal of environmental contaminants already had occurred before Fleet used the facility to foreclose on SPW's inven-

tory and equipment. *Cf.* 42 U.S.C. § 9607(a)(2) (West Supp. 1988) (providing that an operator of a facility is not liable for response costs unless he operated the facility "at the time of disposal" of a hazardous substance). There is no genuine dispute that neither Fleet nor its agents entered the facility as an operator or otherwise operated the facility before Baldwin conducted an auction at the facility on June 22, 1982, or after Nix left the facility in or around December, 1983.

On January 20, 1984, plaintiff, through the Environmental Protection Agency ("EPA"), inspected the facility. Plaintiff alleges that it found 700 fifty-five gallon drums containing toxic chemicals. Plaintiff alleges that the toxic chemicals that it found were an immediate threat to public health and the environment. Based on this conclusion, the EPA initiated the first of a two-part response to the alleged environmental threat. Between February 6-24, 1984, the EPA disposed of the solutions in the fifty-five gallon drums.

After assessing the condition of the asbestos allegedly found at the facility, the EPA concluded that the asbestos problem, if unabated, presented a serious threat to public health and the environment. Therefore, between June 12, 1984, and July 11, 1984, the EPA conducted the second phase of its response to the alleged environmental threat and removed forty-four truck loads of material containing asbestos to an approved landfill. Plaintiff alleges that it incurred costs of almost $400,000 in both phases of its response to the alleged environmental threat at the facility.

STANDARD OF REVIEW

Summary judgment is only appropriate if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When the moving party's motion for summary judgment

has pierced the pleadings of the opposing party, the burden then shifts to the opposing party to demonstrate that a genuine issue of fact exists. *Cole v. Elliot Equip. Corp.*, 653 F.2d 1031, 1033 (5th Cir. 1981) (citing Fed. R. Civ. P. 56(e)). A party cannot carry this burden by relying on conclusory allegations in the pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968); Fed. R. Civ. P. 56(e)). A federal court may not grant summary judgment, however, unless there is only one reasonable conclusion concerning the verdict. *Id.* at 250-52. Moreover, federal courts should resolve all reasonable doubts concerning the factual submissions in favor of the party opposing summary judgment. *Casey Enter. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). With these principles in mind, I will decide to discuss motions for summary judgment in this case.

DISCUSSION

Plaintiff brought this action against defendants pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601-57 (1982 and West Supp. 1988), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613. The relevant provisions of CERCLA provide that the current owner and operator of a facility, or, any person who owned or operated the facility at the time hazardous substances were disposed of, is liable for any response costs of plaintiff to remedy a release or threatened release of a hazardous substance. *See* 42 U.S.C. § 9607(a)(1)-(2) & (4) (West Supp. 1988).

The Court initially will address plaintiff's motion for partial summary judgment against Fleet on the issue of liability and Fleet's cross motion for summary judgment against plaintiff.

To prevail under CERCLA, plaintiff must establish that: (1) Defendant falls within one or more of the classes of liable persons described in 42 U.S.C. § 9607(a)(1)-(4) (West Supp. 1988); (2) A "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (3) The release or threatened release has caused the United States to incur "response costs." *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043-48 [22 ERC 1625] (2d Cir. 1985); 42 U.S.C. § 9607(a)(1)-(4) (West Supp. 1988).

Of the three elements just described, the element that Fleet most vigorously contests is the first element, which requires the government to establish Fleet's inclusion in one of the classes of liable persons. Plaintiff contends that Fleet is within the class of liable persons described as "the owner and operator of a facility." 42 U.S.C. § 9607(a)(1) (West Supp. 1988). This provision obviously refers to the owner of the facility on July 9, 1987, the date plaintiff filed its complaint. CERCLA defines "owner and operator . . . in the case of any facility, title or control of which was conveyed to a unit of State or local government, [as] any person who owned, operated or otherwise controlled activities at such facility immediately beforehand." *Id.* § 9601(20)(A). Emanuel County's tax foreclosure of the facility occurred on July 7, 1987. Nix left the facility in or around December, 1988. Fleet never foreclosed on its security interest in the facility. Neither Fleet nor any of its putative agents had any access, or other control, or engaged in any activities at the facility after Nix left the facility in or around December, 1988. Based on the undisputed facts, I conclude as a matter of law that Fleet did not own, operate or otherwise control activities at the facility immediately before the tax foreclosure. Accordingly, Fleet is not in the class of liable persons described in 42 U.S.C. § 9607(a)(1) (West Supp. 1988).

Plaintiff alternatively argues that Fleet is in the class of liable persons described in 42 U.S.C. § 9607(a)(2)

(West Supp. 1988). That provision imposes CERCLA liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . ." *Id.* For the purpose of the foregoing provision, CERCLA excludes from the definition of "owner or operator" any "person, who, without participating in the management of a vessel or facility, holds *indicia of ownership* primarily to protect his security interest in the vessel or facility." *Id.* § 9601(2)(A) (emphasis added). I interpret the phrases "participating in the management of a . . . facility" and "*primarily* to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation. *Id.*; *cf. United States v. Mirabile*, 1985, Envtl. L. Rep. 10994, 10995 (E.D. Pa. Sept. 4, 1985) (holding that secured creditor exclusion from CERCLA liability applies if secured creditor "does not become overly entangled in the affairs of the actual owner or operator of a facility").

Plaintiff concedes that Fleet never owned the facility within the meaning of CERCLA. Plaintiff argues, however, that Fleet's activities at the facility both before and after Baldwin entered the facility to prepare for, and conduct the auction constituted participation in the management of the facility sufficient to impose CERCLA liability on Fleet. I first will address the period of time between 1976 when Fleet commenced its relationship with SPW and shortly before June 22, 1982, when Baldwin entered the facility. I have carefully reviewed plaintiff's factual submissions and argument concerning that period and defendants countervailing submissions and argument. I have resolved all doubts in the factual record for that period in favor of plaintiff, the non-moving party.

I conclude as a matter of law that Fleet's activities at the facility did not rise to the level of participation in management sufficient to impose CERCLA liability on Fleet for its activities before Baldwin entered the facility to prepare for, and conduct, the auction.

I now will discuss Fleet's activities at the facility between the time that Baldwin entered the facility to prepare for and conduct the June 22, 1982, auction and the time that Nix finally left the facility in or around December, 1983.

Plaintiff alleges that Baldwin moved the barrels that allegedly contained hazardous substances before Baldwin conducted the public auction. Plaintiff contends that after the auction, Baldwin auctioned some, but not all, of the machinery and equipment as is, and in place, and permitted the purchasers to remove the equipment and machinery that they had purchased. Plaintiff asserts that after the auction Fleet signed a document that permitted Nix to have access to the facility for 180 days and to remove any remaining machinery and equipment that either was not sold at the auction or was not removed by the purchaser. Plaintiff maintains that friable asbestos was knocked loose from the pipes connected to the machinery and equipment by either the purchasers of the equipment at the auction or Nix. Plaintiff alleges that the condition of the chemicals and the asbestos in the facility after Baldwin, Nix, and the purchasers concluded their business constituted an immediate risk to public health and the environment for which it incurred response costs. Plaintiff concludes that Fleet is liable for those response costs under CERCLA.

Fleet genuinely disputes the foregoing material facts alleged by plaintiff. I conclude that the foregoing genuinely disputed facts, and other genuinely disputed facts that I have not mentioned, preclude me from granting the cross motions for summary judgment between plaintiff and Fleet. Accordingly, plaintiff's motion for partial

summary judgment against Fleet on the issue of liability and Fleet's motion for summary judgment are DENIED.

I now will address plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability.* I will summarize the relevant facts that I find are not genuinely disputed. On February 27, 1981, SPW ceased operations. Both before and after that date, Horowitz and Newton actively managed the facility. Horowitz and Newton each held fifty percent of the shares of SPW. Both Horowitz and Newton managed the facility for SPW as debtor-in-possession pursuant to chapter 11 of the bankruptcy code until December, 1981, when SPW was adjudicated a bankrupt under chapter 7 of the bankruptcy code. There were at least some chemicals in fifty-five gallon drums in the facility at the time that Horowitz and Newton ceased actively managing the facility. The chemicals in the fifty-five gallon drums were hazardous substances within the meaning of CERCLA. Horowitz and Newton originally procured the fifty-five gallon drums containing hazardous chemicals that the EPA found in the facility for the purpose of operating SPW's cloth printing business.

Horowitz and Newton fall within the class of liable persons described as those who owned or operated a facility "at the time of disposal of any hazardous sub-

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* Clifford Horowitz filed a memorandum in opposition to plaintiff's motion for partial summary judgment on July 6, 1988. On August 4, 1988, this Court notified all parties in this case of an August 11, 1988, hearing on plaintiff's May 20, 1988, motion. I considered Mr. Horowitz's submission and oral argument before ruling on plaintiff's motion for partial summary judgment. Murrary Newton, who elected to proceed *pro se* after filing several submissions through his former attorney, Charles B. Merrill, Jr., Esq., however, has not responded to plaintiff's motion for partial summary judgment, nor did Mr. Newton appear at the August 11, 1988, hearing on plaintiff's motion. Nevertheless, Fed. R. Civ. P. 56(c) permits this Court to grant summary judgment against Mr. Newton, if appropriate, because a hearing on plaintiff's motion was held over ten (10) days after plaintiff filed its motion.

stance." 42 U.S.C. § 9607(b)(3) (1982). Both Horowitz and Newton assert, however, the third-party defense to CERCLA liability. *See id.* § 9607(b)(3). The third-party defense provides that a person who falls within one of the classes of liable persons under CERCLA may avoid liability if he establishes "by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused *solely* by . . . an act or omission of a third party other than an employee or agent of the defendant. . . ." *Id.* (emphasis added). Horowitz argues that Fleet was solely responsible for the release of hazardous substances at the facility. Newton makes a similar claim in his deposition testimony. Horowitz and Newton claim that Fleet told them not to sell or otherwise dispose of the chemicals at the facility because the chemicals possibly were marketable and Fleet had a security interest in the chemicals. Even if that allegation were true, there is no allegation that Horowitz and Newton, in their capacity as active managers of SPW as a debtor-in-possession, did not have, or could not have obtained bankruptcy court approval to sell or otherwise properly dispose of the hazardous chemicals in the facility after SPW ceased operations. Accordingly, based on the foregoing facts that are not genuinely disputed, I find as a matter of law that Horowitz and Newton are not entitled to the third-party defense to CERCLA liability with respect to plaintiff's response costs for the chemicals contained in the fifty-five gallon drums because a third party was not *solely* responsible, to the exclusion of Horowitz and Newton, for the release or threatened release of the hazardous substances contained in the fifty-five gallon drums. Therefore, plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is GRANTED with respect to plaintiff's response costs for removing the hazardous substances found in the fifty-five gallon drums.

With respect to the asbestos that EPA found at the facility in 1984, any environmental hazard created by the asbestos could have occurred solely in connection with the removal of machinery and equipment by either the purchasers at the foreclosure sale arranged by Fleet or by Nix pursuant to his agreement with Fleet. Therefore, a genuinely disputed factual issue exists concerning whether Fleet, Baldwin, Nix, and the purchasers of the machinery and equipment at the facility *solely* caused any environmental hazard created by the asbestos at the facility when they removed the machinery and equipment. Accordingly, plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is DENIED with respect to plaintiff's response costs for removing the asbestos from the facility.

CERTIFICATION

No federal appellate court has addressed the legal issues or factual applications addressed in this order. Pursuant to 28 U.S.C. § 1292(b) (West Supp. 1988) (section 1292(b)), federal district courts have authority to certify the issues in an order for interlocutory appeal. Section 1292(b) was passed to "aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time. . . ." S. Rep. No. 2434, 85 Cong. 2d Sess. 3-4. The decision concerning whether or not to allow an interlocutory appeal is within the discretion of the district court. *Id.* A district court only should allow such appeals in exceptional circumstances. H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1-2. This case, however, is appropriate for section 1292(b) certification.

I find that this order disposes of controlling questions of law concerning which there is substantial doubt including, but not limited to, my construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition; my construction

of the CERCLA provisions describing the classes of liable persons; and my construction of the scope of the third-party defense to CERCLA liability. I also find that an immediate appeal from this "order may materially advance the ultimate termination of [this] litigation. . . ." 28 U.S.C. § 1292(b) (West Supp. 1988). If this order were modified or reversed on appeal after trial, a new trial that would waste scarce judicial resources likely would be necessary.

For the foregoing reasons, pursuant to section 1292(b), I certify that this case is appropriate for interlocutory appeal. If any party to this case requests an interlocutory appeal pursuant to section 1292(b), all proceedings in this case hereby are STAYED. The stay shall commence on the date that any party applies for an interlocutory appeal in the Court of Appeals and shall conclude on the date that the Court of Appeals either disposes of the interlocutory appeal on its merits or denies all applications for interlocutory appeal.

CONCLUSION

To recapitulate: (1) Plaintiff's motion for partial summary judgment against Fleet on the issue of liability is DENIED; (2) Fleet's motion for summary judgment is DENIED; (3) Plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is GRANTED with respect to plaintiff's response costs for removing the hazardous substances found in the fifty-five gallon drums; (4) Plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is DENIED with respect to plaintiff's response costs for removing the asbestos from the facility; (5) This case hereby is CERTIFIED as appropriate for interlocutory appeal pursuant to section 1292(b); and (6) All proceedings in this case are STAYED, commencing on the date that any party applies for an interlocutory appeal in the Court of Appeals

and concluding on the date that the Court of Appeals either disposes of the interlocutory appeal on its merits or denies all applications for interlocutory appeal.

ORDER ENTERED at Augusta, Georgia, this 22nd day of December, 1988.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8094
D.C. Docket No. CV687-070

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FLEET FACTORS CORP.,
Defendant-Third-Party
Plaintiff-Appellant,

CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants,

ROBERT KOLODNEY, ESQ,
as Trustee of Swainsboro Print Works, Inc.,
Debtor,
Third-Party Defendant.

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE* and KRAVITCH, Circuit Judges, and LYNNE**, Senior District Judge.

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* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989, did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby AFFIRMED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: May 23, 1990

For the Court:

MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: Jul. 27, 1990

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-8094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FLEET FACTORS CORP.,
Defendant-Third Party Plaintiff-Appellant,

CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants,

ROBERT KOLODNEY, ESQ.,
as Trustee of Swainsboro Print Works, Inc.,
Debtor,
Third-Party Defendant.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 23, 11th Cir., 1990, —— F.2d ——)
(July 17, 1990)

Before: VANCE * and KRAVITCH, Circuit Judges, and LYNNE *, Senior District Judge.

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* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. § 46(d).

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
PHYLLIS KRAVITCH
United States Circuit Judge

(5)

No. 90-504

In the Supreme Court of the United States

OCTOBER TERM, 1990

FLEET FACTORS CORP., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) requires the owner or operator of a facility to compensate the government for the government's expenses in responding to a release or threatened release of hazardous substances. § 107, 42 U.S.C. 9607. CERCLA exempts from the definition of an "owner or operator" a person who "without participating in the management" of a facility holds indicia of ownership to protect his security interest in the facility. § 101(20)(A), 42 U.S.C. 9601(20)(A). In this case, the government sought response costs from petitioner, a secured lender, and the district court denied motions for summary judgment on the ground that there were genuine issues of material fact as to petitioner's participation in the management of the facility.

The question presented is whether the court of appeals erred in affirming the district court's order denying petitioner's motion for summary judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-504

FLEET FACTORS CORP., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 901 F.2d 1550. The opinion of the district court (Pet. App. 21a-34a) is reported at 724 F. Supp. 955.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on May 23, 1990, and a petition for rehearing was denied on July 17, 1990 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on September 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9601 *et seq.*, enlarged the Environmental Protection Agency's (EPA's) authority to deal effectively with the release of hazardous substances into the environment. Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), EPA may take direct "response" actions to abate any actual or threatened release of any hazardous substance. 42 U.S.C. 9604(a)(1). In order to pay for federal response actions, Congress has established the Hazardous Substance Superfund. See 26 U.S.C. 9507. CERCLA also provides that the federal government may bring cost recovery actions pursuant to Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A), to replenish the fund when EPA has expended money in performing response actions.

To recover response costs under Section 107 of CERCLA, the government must establish four elements: (1) the defendant falls within one or more of the classes of liable persons described in Section 107(a); (2) the site is a "facility" as defined in Section 101(9); (3) a "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (4) the release or threatened release has caused the United States to incur "response costs." 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984, 991-992 (D.S.C. 1984), aff'd *sub nom. United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).[1] Only the first of these four

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[1] It is well settled that responsible parties are strictly liable under CERCLA. *E.g.*, *Monsanto*, 858 F.2d at 167; *Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). In addition, they are jointly and severally liable when the en-

elements is at issue in this petition and the underlying appeal.

Section 107(a) establishes four broad classes of liable persons: (1) the owners and operators of hazardous substance facilities and sites; (2) those persons who owned or operated a facility at the time hazardous substances were disposed of at that facility; (3) those persons who arranged for disposal or treatment of the hazardous substances; and (4) those persons who transported the hazardous substances and selected the disposal facility. 42 U.S.C. 9607(a)(1)-(4)

In establishing broad liability for owners of hazardous substance facilities under Section 107(a)(1) and (2), Congress recognized the need to protect those persons who would otherwise be liable because of their ownership interest in a facility, but who held indicia of ownership merely to protect security interests. Accordingly it enacted the "secured creditor exemption" of Section 101(20)(A), which excludes from the definition of an owner or operator

> * * * a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. 9601(20)(A). As Representative Harsha (who introduced the secured creditor amendment) explained, "This change was necessary because the original definition [of owner] inadvertently subjected those who hold title to a vessel or facility, but do not participate in the management or operation and are not otherwise affiliated with the

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vironmental harm is indivisible. *E.g., O'Neil* v. *Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Monsanto*, 858 F.2d at 171; *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983).

person leasing or operating the vessel or facility, to the liability provisions of the bill." See House Debate on H.R. 85, 96th Cong., 1st Sess. (1979) (Sept. 18, 1980), *reprinted in* 2 Staff of Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the CERCLA* 889, 945 (Comm. Print 1983) [hereinafter *Leg. Hist.*].[2]

2. The United States filed a Section 107 cost recovery action against potentially responsible parties, including petitioner Fleet Factors Corporation, to recover the costs EPA had incurred in cleaning up, and preventing further release of, hazardous substances at the Swainsboro Print Works (SPW) in Emanuel County, Georgia. SPW is an inactive, bankrupt cloth printing facility located near public water wells and private residences. EPA spent approximately $375,000 in a two-stage cleanup of hazardous substances at the site, including vats of sodium cyanide, storage tanks of caustic soda, approximately 700 rusty, leaky 55-gallons drums of dyes and chemicals, and 44 truckloads of friable asbestos. Pet. App. 2a-3a, 25a.

After extensive discovery, the United States and petitioner filed cross-motions for summary judgment. In its motion, the United States primarily argued that petitioner was liable under Section 107(a)(2) as either an owner or operator of the SPW facility at the time hazardous substances were disposed of at that facility.[3] The government

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[2] The secured creditor exemption was first introduced into the House version of CERCLA, H.R. 85, as an amendment to clarify the definition of "owner" and remained part of that definition throughout successive versions of the bill; the definition of "operator" was an entirely separate provision. See H.R. 85, *reprinted in* 2 *Leg. Hist.* 1021-1022. The Senate version, which provided a definition of "owner or operator", lacked a secured creditor exemption. S. 1480, 96th Cong., 1st Sess. (1979) (as reported), *reprinted in* 1 *Leg. Hist.* 470. The secured creditor exemption was adopted as part of the definition of that term.

[3] The United States also asserted that petitioner could be held liable as the current owner or operator of the SPW facility, 42 U.S.C.

based its claim on extensive evidence of petitioner's involvement in SPW's affairs before and after SPW ceased printing operations in February 1981, and on petitioner's control of the defunct facility during the three years that followed. See Pet. App. 17a-18a, 27a-29a. Petitioner invoked the CERCLA Section 101(20)(A) "secured creditor" exemption from owner liability. Petitioner contended that it was merely a secured creditor holding indicia of ownership whose involvement in SPW's affairs did not constitute participation in management. See Pet. App. 9a-10a, 22a, 28a.

The district court denied the United States' and petitioner's motions for summary judgment. Pet. App. 33a. The court first summarized the undisputed facts in this case, which showed among other things that: (1) petitioner held a security interest in SPW's facility, equipment and inventory; and (2) when SPW filed for bankruptcy protection and ceased operations, petitioner foreclosed on its security interest in some of the SPW's equipment and inventory, and contracted with others to sell and remove those items. *Id.* at 23a-24a. The court stated that there was a "genuine dispute" as to the actions of petitioner's agents in handling and disposing of hazardous substances at the site. *Id.* at 24a-25a.

The court concluded that petitioner was not a present owner of the SPW facility (Pet. App. 27a; see note 3, *supra*), and turned to the question whether petitioner qualified for the secured creditor exemption. The court stated:

> I interpret the phrases "participating in the management of a . . . facility" and "*primarily* to protect his

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9607(a)(1), under the definition set forth in 42 U.S.C. 9601(20)(A)(iii). The district court and court of appeals rejected that argument (Pet. App. 8a-9a, 27a), which is not at issue in this petition.

> security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

Id. at 28a. The court concluded that petitioner did not participate in the management of SPW prior to the time petitioner's agents entered the facility to sell and remove equipment. *Id.* at 29a. It concluded, however, that petitioner's and its agents' subsequent activities raised genuine issues of material fact as to whether petitioner was entitled to the secured creditor exemption, which precluded entry of summary judgment for either party. *Id.* at 29a-30a.

3. On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals affirmed the district court's denial of petitioner's motion for summary judgment and remanded the case for further proceedings. Pet. App. 1a-20a. The court of appeals specifically agreed with the district court "that the facts alleged by the government with respect to Fleet's involvement after Baldwin [petitioner's agent] entered the facility were sufficent to preclude the granting of summary judgment" as to petitioner's entitlement to the secured creditor exemption. *Id.* at 12a-13a. See also *id.* at 17a, 19a-20a.[4]

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[4] The court of appeals also concluded that there was a genuine issue of fact as to whether petitioner participated in SPW's management between the time SPW ceased printing operations and the time petitioner contracted with an agent to auction SPW's equipment and fixtures. Pet. App. 17a-18a. The court of appeals accordingly determined that the district court "erred in construing the secured creditor exemption to insulate Fleet from CERCLA liability for its conduct prior to June 22, 1982." *Id.* at 19a-20a.

Although the court of appeals affirmed the district court's denial of petitioner's motion for summary judgment, it also indicated that a secured creditor could participate in the management of the facility, for purposes of CERCLA Section 101(20)(A), even if it did not become involved in day-to-day management of the business. The court stated that

> a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.

Pet. App. 14a. The court further stated that, in any event, under the government's allegations, petitioner's "involvement in the financial management of the facility was pervasive, if not complete." *Id.* at 17a-18a. Indeed, the court explained that the government's allegations, if proven, would permit the district court to find not only that petitioner was an "owner" that is ineligible for the "secured creditor" exemption, but also—as an alternative basis of liability—that petitioner's extensive involvement in SPW's management qualified petitioner as an "operator" of SPW. *Id.* at 10a n.6, 18a-19a.[5] The court of appeals accordingly remanded the case to the district court to resolve the disputed issues of fact. *Id.* at 20a.

ARGUMENT

This case is in an interlocutory posture. Indeed, as the court of appeals suggested, it may be resolved on remand without reaching the question presented in the petition for a writ of certiorari. The court of appeals' decision raises a

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[5] The court noted that during oral argument, petitioner "virtually conceded operator liability for its conduct with respect to the facility" (Pet. App. 19a n.15).

narrow issue of statutory construction and does not conflict with any decision of this Court or another court of appeals. Petitioner and its amici essentially seek an advisory opinion from this Court on a matter that is not ripe for this Court's review and, moreover, may be affected by developing legislative and administrative action.

1. The court of appeals affirmed the district court's denial of motions for summary judgment and remanded the case for further proceedings. Under this Court's established practice, review of this interlocutory ruling is inappropriate. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.").

Indeed, it would be particularly inappropriate for this Court to grant interlocutory review in this case. As the court of appeals recognized, petitioner based its motion for summary judgment on the contention that petitioner, as a matter of law, had not "participat[ed] in the management" of SPW (CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A)). The court of appeals and the district court both concluded that petitioner had failed to establish the absence of a genuine factual dispute as to whether petitioner had participated in the management of SPW. See Pet. App. 4a, 17a-19a, 25a-26a, 28a-30a. This Court does not normally review concurrent findings of fact by two lower courts. *E.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). This Court should be even more reluctant to interfere with ongoing proceedings by con-

ducting an interlocutory review of concurrent determinations by two lower courts that a genuine factual dispute *exists*.

Petitioner, at bottom, is simply displeased with the court of appeals' description of the reach of the secured creditor exemption, stating that the court of appeals' decision "makes it extremely difficult for financial institutions to determine how they can protect their secured loans without incurring massive liability." Pet. 5. Petitioner contends (*ibid.*) that "it is important for this Court to clarify the reach of the CERCLA liability scheme" because "financial institutions have been relying" on the language in other cases, such as *United States* v. *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985). "This Court, however, reviews judgment, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Moreover, petitioner's preferred language would not produce a different result in this case. The district court applied the standard set forth in *Mirabile* and nevertheless denied petitioner's motion for summary judgment. Pet. App. 28a.

Beyond these formidable problems, this Court's interpretation of the secured creditor exemption would be purely advisory at this juncture. As the court of appeals observed and petitioner "virtually conceded" (Pet. App. 18a-19a & n.15), the government's factual allegations, if proven, "would pass the threshold for operator liability under section 9607(a)(2)." Thus, the court of appeals' interpretation of the secured creditor exemption, insofar as it is challenged by petitioner, may prove to be immaterial in determining petitioner's liability. Indeed, the government opposed petitioner's request for interlocutory appeal on the ground, among others, that on the present record the court of appeals could not dispositively resolve the question of secured creditor liability in this case. See

Memorandum of the United States in Opposition to Petitioner Fleet Factors Corporation's Application to Permit Interlocutory Appeal (Jan. 10. 1989). It would obviously be inappropriate for this Court to undertake to address the subject in the absence of a concrete factual setting.

2. Even if this case were not interlocutory, it would not be ripe for this Court's review. The issue that petitioner wishes resolved is a narrow question of statutory construction that does not conflict with any decision of this Court or another court of appeals. Petitioner and its amici concede that only one other court of appeals—the Ninth Circuit—has thus far encountered the question. See *In re Bergsoe Metal Corp.*, 910 F.2d 668 (1990). They are plainly wrong in asserting that there is a "tension" or "conflict" between the court of appeals' decisions. Pet. 6; American Bankers Ass'n Br. 5 n.3; American College of Real Estate Layers Br. 17; Bank of Boston Br. 26-30.

In *Bergsoe,* the shareholders of a bankrupt recycling company sued a municipal corporation under CERCLA alleging that the municipal corporation—which had issued revenue bonds for the recycling company—was responsible, as an owner, for the cleanup of hazardous wastes at the recycling site. 910 F.2d at 670. The bankruptcy court granted summary judgment in favor of the muncipal corporation and the district court affirmed. *Ibid.* The Ninth Circuit affirmed the district court's decision, holding there was no genuine factual dispute that the municipal corporation "holds indicia of ownership primarily to protect its security interest and that it did not participate in the management of the Bergsoe recycling plant." *Id.* at 673. The Ninth Circuit acknowledged the standard that the Eleventh Circuit proposed in this case for determining whether a secured creditor has participated in the management of a facility. *Id.* at 672. The Ninth Circuit concluded,

however, that it could "leave for another day" the determination of the "precise parameters of 'participation' " that would render a secured creditor liable under CERCLA. *Ibid.* The court explained:

> As did the Eleventh Circuit in *Fleet Factors,* we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes.

Id. at 673 n.3. Unlike the Eleventh Circuit in *Fleet Factors,* the Ninth Circuit found no evidence that the secured creditor exercised actual management authority. It accordingly affirmed the entry of summary judgment. *Id.* at 673.

Thus the reasoning of the Ninth Circuit is entirely consistent with that of the Eleventh Circuit. A secured creditor is entitled to summary judgment if the creditor shows, beyond factual dispute, that it did not participate in the management of the facility. Petitioner in this case, unlike the secured creditor in *Bergsoe*, simply failed to establish the absence of a factual dispute.[6]

3. Petitioner and its amici also contend that the court of appeals' decision has increased the prospect of lender

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[6] Petitioner and its amici attempt to create the impression of a circuit conflict by arguing that the Eleventh Circuit's standard would permit liability in the absence of actual management participation. See Pet. 6, 9-10; American Bankers Ass'n Br. 5 n.3; Bank of Boston Br. 27-28. Whatever the scope of the Eleventh Circuit's standard, it clearly requires—as the Ninth Circuit expressly recognized, *supra*—actual participation in management. See Pet. App. 14a ("[A] secured creditor will be liable if *its involvement with the management of the facility* is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." (emphasis added)). One cannot create a circuit conflict simply by eliding the portion of a court's holding that indicates accord. See American College of Real Estate Lawyers Br. 17.

liability and thereby caused "potential harm to the nation's economy," "wreaked havoc upon commercial practice," and "sent a shock wave throughout the country." Pet. 7, 10-14; American Bankers Ass'n Br. 5, 9; American College of Real Estate Lawyers Br. 3. They offer no evidence to support their concerns, which indeed are premised on an overly broad (and unrealistic) reading of the Eleventh Circuit's standard. See note 6, *supra*. Both the Ninth Circuit and the Eleventh Circuit interpreted the secured creditor exemption in a manner that permits a lender to "monitor[] any aspect of a debtor's business" and "become involved in occasional and discrete financial decisions relating to the protection of its security interest." Pet. App. 15a; see also 910 F.2d at 672-673. Moreover, petitioner's objection to the use of inferences in determining the scope of management participation (Pet. 9) is misplaced. The court found no need to rely on inferences in this case. See Pet. App. 18a n.13.[7]

The lending community's need for this Court's advice on the scope of the secured creditor exemption is further diminished by the fact that the government has rarely sought to hold lenders liable under CERCLA and—as demonstrated in this case—has generally sought such relief

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[7] Petitioner also contends (Pet. 11-13) that the court of appeals' interpretation of a lender's potential liability under CERCLA is inconsistent with the scope of a lender's liability in other legal contexts. Congress, however, enacted CERCLA to provide a comprehensive federal system of liability appropriate to the problem at hand. Thus, other principles of lender liability are not dispositive of a lender's potential liability under CERCLA. In any event, it is not clear that those other principles would absolve petitioner in this case. Petitioner also speculates that the court of appeals' decision might "expose[] lenders to substantial risk under other doctrines of lender liability" (Pet. 13). Petitioner does not contend, however, that it faced conflicting obligations in this case.

only where the lender's participation in the management of the facility is extensive. Moreover, to the extent that clarification of the law is needed, other more appropriate fora are available. Several bills were introduced during the 101st Congress that address the issue of lender liability.[8] In addition, EPA has initiated an effort to develop a rule that would provide guidance to commercial lenders holding mortgage-type indicia of ownership.[9] Thus, even if the issue petitioner presents were otherwise ripe for this Court's examination, the Court might find it advisable to await the outcome of the legislative and administrative proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

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[8] See, *e.g.*, H.R. 4494, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H1505 (daily ed. Apr. 4, 1990); S. 2827, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. S9171 (daily ed. June 28, 1990). We anticipate that similar legislation will be introduced in the 102d Congress.

[9] See Prepared Statement of James M. Strock, EPA Assistant Administrator for Enforcement, presented in *Hearing on H.R. 4494 Before the House Subcomm. on Transportation and Hazardous Materials of House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (Aug. 2, 1990). We have lodged copies of the prepared statement with the Clerk of the Court.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20248

No. 90-504

IN THE
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF PETITIONER FLEET FACTORS CORP.

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

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REPLY BRIEF OF PETITIONER FLEET FACTORS CORP.

Fleet Factors Corp. ("Petitioner") respectfully submits this Reply Brief in support of its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

STATUTE INVOLVED

The matter before the Court involves several sections of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): §§ 101 (20)(A), 107(a) of CERCLA, 42 U.S.C.A. §§ 9601(20)(A),

9607(a) (West Supp. 1990). These are set forth verbatim in the Petition for Writ of Certiorari. Petition at 2. In essence, this matter involves the proper interpretation of the CERCLA statute's "secured creditor exemption," an issue of significant national importance.

ARGUMENT

I. THE GOVERNMENT DOES NOT DENY THAT THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE

The Eleventh Circuit has rendered an incorrect decision on a vitally important question of federal law: whether CERCLA's "secured creditor exemption" protects a secured lender from liability for environmental cleanup costs where the lender neither took title to any of the borrower's property, nor participated in the day-to-day management of the facility in question. The government's brief in opposition does not deny the importance of this issue.

Indeed, several of the government's own agencies have acknowledged the significant and negative impact of the Eleventh Circuit's decision on the nation's financial institutions. For example, an official of the Federal Deposit Insurance Corporation recently stated: "The FDIC is very concerned about nonculpable lenders' potential liability under [CERCLA]. . . . The *Fleet Factors* decision may have an enormous impact on lenders." Testimony of Steven A. Seelig, Director of the Division of Liquidation at the FDIC, Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives 1, 12 (Aug. 2, 1990). *See also* Testimony of David C. Cooke, Executive Director of the Resolution Trust Corporation, Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives 4 (Aug. 2, 1990) ("The impact of [CERCLA] is highlighted and, to a

great extent, exacerbated by a recent case, *United States v. Fleet Factors*").

Moreover, the government's brief acknowledges that the concern of the lending community resulting from the decision has attracted the attention of Congress and the U.S. Environmental Protection Agency ("EPA"). *See* Brief in Opposition at 13. The government concludes that the Court "might find it advisable to await the outcome of the[se] legislative and administrative proceedings." *Id.* at 13. However, the prospect that these activities will correct the erroneous decision of the Eleventh Circuit is speculative at best.

CERCLA was reauthorized for a period of three years at existing levels at the conclusion of the 101st Congress. Congress is therefore unlikely to visit CERCLA issues in the near future because it has several other major environmental statutes to reauthorize in the meantime (i.e., the Clean Water Act and the Resource Conservation and Recovery Act). Any rulemaking by EPA construing CERCLA in a manner different from the Eleventh Circuit's decision will not have the effect of reversing or overruling the Court of Appeals. In addition, an EPA rule different from *Fleet Factors* presumably would not control a private cost recovery action under CERCLA.

II. SIGNIFICANT TENSION EXISTS BETWEEN THE ELEVENTH CIRCUIT'S DECISION IN FLEET FACTORS AND THE NINTH CIRCUIT'S DECISION IN BERGSOE METAL CORP.

Significant tension exists between the Eleventh Circuit's decision in the *Fleet Factors* case and the Ninth Circuit's decision in the *Bergsoe Metal Corp.* case. *See In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). Therefore, review by the Court at this time is warranted. Sup. Ct. R. 10.1(a).

An absolute or definitive conflict among the circuits is not necessarily required for the Court to grant review. For example, in *Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176, *reh'g denied*, 448 U.S. 917 (1980), the Court "granted certiorari . . . to forestall a possible conflict in the lower courts and to resolve an issue of prime importance in the administration of the patent law." *Id.* at 185. The Court explained that "[t]here [was] no direct conflict [in that case], but a number of decisions exhibit[ed] some tension" on the patent issues involved. *Id.* at 185 n.4.

The government has concluded erroneously that "the reasoning of the Ninth Circuit [regarding the "secured creditor exemption"] is entirely consistent with that of the Eleventh Circuit." Brief in Opposition at 11. The inconsistency of the two circuits' construction of the statute is evident from the plain language of their decisions.

The Eleventh Circuit expressly held the following:

> [A] secured creditor *will be liable if* its involvement with the management of the facility is sufficiently broad to support the inference that *it could affect* hazardous waste disposal decisions if it so chose.

901 F.2d at 1558 (emphasis added). The Ninth Circuit, on the other hand, reached a clearly different and more reasonable approach to CERCLA's "secured creditor exemption." Although the Ninth Circuit indicated that it would "leave for another day the establishment of a Ninth Circuit rule," it went on to hold:

> What is critical [in deciding whether to impose lender liability] is *not what rights the Port had, but what it did.* The CERCLA security interest exception uses the active "participating in management." Regardless of what rights the Port may have had, it cannot have participated in management if it never exercised them.

910 F.2d at 672-73 (emphasis added).

Therefore, the Eleventh and Ninth Circuit's views of when a secured lender falls outside the protection of the "secured creditor exemption" are patently at odds with each other. The measure of liability under the Eleventh Circuit's rule is the type of activity which the lender *could have* engaged in or affected. The measure of liability according to the Ninth Circuit, however, is limited to the activity *actually* engaged in by the lender. If the two circuits' approaches were consistent with each other, as the government contends, then the Ninth Circuit would have found the lender in the *Bergsoe* case liable because the loan documents provided the lender with authority to affect the decision of the borrower. *See* 910 F.2d at 672-73.

The question presented to the Court by Petitioner is, as noted above, of prime importance. Tension does exist between the federal circuits' interpretations of CERCLA's "secured creditor exemption." Thus, this case is appropriate for review by this Court.

III. THE QUESTION PRESENTED IS RIPE FOR REVIEW AT THIS TIME

In its opposition, the government focuses on the interlocutory posture of this case, but fails to recognize that the broad rule announced by the court below is not fact-bound. *See* Brief in Opposition at 7-10. This is not an interlocutory case resting on disputed facts or conflicting affidavits; rather, this case presents a broad legal ruling that casts uncertainty over the settled commercial expectations of secured lenders. Thus, the interlocutory posture of this case does not justify a denial of certiorari.

An interlocutory ruling by a United States circuit court, including a denial of summary judgment, is ripe for review by the Court; and the decision to grant or deny a petition for certiorari is firmly grounded in the Court's discretion. 28 U.S.C.A. § 1254(1) (West Supp. 1990); Sup. Ct. R. 10.1.

The government incorrectly intimates that a hard and fast litmus test exists for when a writ of certiorari will be granted or denied. Brief in Opposition at 8. The Court frequently grants review of interlocutory rulings regarding summary judgment motions. *See Chan v. Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1678-79 (1989) (review of a denial of summary judgment on a damages limitation issue in a wrongful death action); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 336-37 (1982) (review of a denial of summary judgment on the issue of liability in an antitrust action). The cases cited by the government are inapposite, as none of them involved a summary judgment ruling. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 658-60 (1987); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R.R.*, 389 U.S. 327, 327-28 (1967); *Black v. Cutter Laboratories*, 351 U.S. 292, 295-96 (1956); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 253-54 (1916).

The question presented to the Court by Petitioner is in fact particularly ripe for review at this time. The Eleventh Circuit has issued a final ruling which establishes a far-reaching, new legal standard for CERCLA's "secured creditor exemption." *See City of New Orleans v. Dukes*, 427 U.S. 297, 301-03 (1976) (under the analogous but recently repealed § 1254(2), final ruling ripe for review although related issues still to be resolved on remand). Unless this legal standard is reviewed by the Court, the district court must apply this new but erroneous rule on remand. Contrary to the government's contention, the application of this rule will require the district court to reverse its earlier grant of partial summary judgment for Petitioner on the issue of liability for the time from February 1981 to June 1982. *See* Petition at 4, 19a-20a; Brief in Opposition at 9.

The dispute in this case then is not over factual findings as the government intimates. Brief in Opposition at 2-10. Rather, it is over the Eleventh Circuit's final

and improper interpretation of the "secured creditor exemption" under CERCLA. Therefore, the Court should grant review to correct this substantial legal error before it is perpetuated.

CONCLUSION

For the substantial reasons stated in this Reply Brief and in Petitioner's Petition for a Writ of Certiorari, Petitioner, Fleet Factors Corp., requests the Court to grant the writ of certiorari to review the judgment of the Eleventh Circuit.

Respectfully submitted,

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AND THE CALIFORNIA BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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ISSUE PRESENTED

Does a lender, who neither forecloses on a borrower's real property nor involves itself in the day-to-day management of the borrower's facility, become liable under the federal Superfund statute for environmental response costs incurred at the borrower's facility?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-504

FLEET FACTORS CORP.,

Petitioner,

v.

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AND THE CALIFORNIA BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the commercial banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money centers, regional and community banks. ABA members hold approximately ninety-five percent of the domestic assets of United States banks.

The California Bankers Association ("CBA") is a trade association incorporated under the laws of the State of California. Virtually every state and federally chartered commercial bank doing business in the state (approximately 420 institutions) is a member of CBA. As a result, CBA is necessarily concerned with judicial matters that affect the business of its members, including litigation involving liability for financial institutions under CERCLA. The published opinion of the Eleventh Circuit Court of Appeals in this lawsuit is such a matter.

The Eleventh Circuit is one of only two federal appellate courts to analyze the responsibility of lenders under the federal Superfund law for the cost of removing hazardous substances from their borrowers' property. The ruling below increases banks' exposure to liability by virtually eliminating the statute's specific exemption for secured creditors and by articulating a standard which is so vague that current lending practices are called into question.

The amici are in a unique position to express the views of financial institutions with respect to the issues raised in this case. Commercial lending is the cornerstone of their members' business, and the banking industry—innocent of having polluted borrowers' property—will, nevertheless, likely bear the costs of cleanups and the brunt of adverse consequences which will result if this decision is allowed to stand. The American Bankers Association and the California Bankers Association, on behalf of their members, appear here, with consent of the parties,[1] to urge the

[1] Consent letters from both parties are filed herewith in the office of the Clerk.

Court to grant the Petition for Writ of Certiorari in this case.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's[2] opinion in this case construes a key provision of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"). 42 U.S.C.A. §§ 9601 to 9675 (West Supp. 1990). This statute governs the liability for the cost of removing hazardous substances from polluted property. At issue is the scope of 42 U.S.C.A. section 9601(20)(A) which exempts secured creditors from a class of persons (owners or operators) liable under Superfund. Because this ruling is one of the few federal appellate decisions construing this section, the court's reasoning will inevitably be looked upon as an authoritative statement of CERCLA's applicability to secured lenders.

Collateralized lending is the backbone of the commercial banking business. At the end of the second quarter of 1990, federally insured commercial banks had over $620 billion of commercial and industrial loans on their books as well as over $800 billion in real estate loans. Federal Deposit Insurance Corporation, *Quarterly Banking Profile* (Second Quarter 1990) at 3. The Eleventh Circuit's vague and overly broad holding calls into question the traditional relationship and practices between secured lenders and

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[2] It is interesting to note that only one Judge of the United States Court of Appeals for the Eleventh Circuit decided this case. Circuit Judge Vance was assassinated during the pendency of the appeal and Senior District Judge Lynne of the United States District Court for the Northern District of Alabama sat on the panel by designation.

their borrowers and makes it very difficult for the lending community to determine how to avoid environmental liability.

The inevitable result of this confused state of the law is to reduce the availability of credit and increase the costs of loan transactions. Certain classes of borrowers will be unable to obtain financing at any price. Borrowers experiencing financial difficulties will find their lenders much less willing to use their financial expertise or offer advice for fear that these actions will trigger environmental liability. At a time when many regions of the country are in the throes of a real estate recession (in some states over ten percent of the banks' real estate loans are non-current), the banking industry can ill afford uncertainty and risks presented by the Court of Appeals' ruling. *See* American Banker, October 15, 1990, at 25 col. 1.

Relatively few courts have considered the scope of the exemption for secured creditors contained in 42 U.S.C.A. section 9601(20)(A). Until the ruling in this case, however, most lenders conducted business under the assumption that liability would not arise unless they "operated" the contaminated facility or became an "owner" of the facility through foreclosure. *United States v. Mirabile*, 15 Envtl. L. Rep. 20,994 (E.D. Pa. Sept. 4, 1985) ("day-to-day" participation in the operational aspects of the site necessary to trigger liability); *United States v. Maryland Bank and Trust*, 632 F. Supp. 573 (D. Md. 1986) (exemption in CERCLA for secured lenders no longer applicable where lender forecloses and becomes "owner" of contaminated property). While the banking industry does not agree with the holdings in these cases, they do establish certain parameters for determining when lia-

bility will arise. The expansive language of the decision in this case introduces an unacceptably high level of uncertainty and essentially removes CERCLA's protection for secured lenders.

The amici will not burden the Court with a repetition of points which have been more than adequately covered in the Petitioner's brief. For the purposes of this brief, it is sufficient to note that the standard adopted by the Court of Appeals[3] has sent shock waves through the lending community and mobilized the financial services industry to seek clarification from Congress. The Court of Appeals' opinion has generated a tremendous negative reaction and is probably the key reason for the widespread support of legislation to amend CERCLA.

In the House of Representatives, Congressmen John J. LaFalce has introduced a bill to protect lenders and to help small businesses that are finding it extremely difficult to obtain financing. H.R. 4494, 101st Cong. 2d Sess., 136 Cong. Rec. H1505 (1990). Senator Jake Garn has introduced similar legislation in the Senate. S. 2827, 101st Cong. 2d Sess., 136 Cong. Rec.

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[3] The Court of Appeals held that "a secured creditor may incur liability . . . if its involvement with the management of the facility is sufficiently broad to support the inference that it *could* affect hazardous waste disposal decisions if it so chose." *United States v. Fleet Factors Corp.*, 901 F. 2d 1550 at 1557-58 (11th Cir. 1990) (footnotes deleted, emphasis added). The other federal circuit court to consider this issue is in direct conflict with the Eleventh Circuit on this precise point. It adopts a narrower standard by noting that "there must be *some actual* management of the facility before a secured creditor will fall outside the exception." *In re Bergsoe Metal Corporation*, 910 F.2d 668, 672 (9th Cir. 1990) (emphasis added).

S9171 (1990). As of October 2, 1990 H.R. 4494 was co-sponsored by 287 members of the House. (LEXIS, Genfed library, Bill Tracking file.)

At a June 7 hearing on H.R. 4494 before the House Committee on Small Business, Representative LaFalce, the first sponsor of a Superfund bill, stated that he "introduced . . . H.R. 4494 [to] overturn the recent court decisions and *restore Congress' original intent* in enacting Superfund. In essence, my bill would bring the law back to the way it was before 1986, when courts first started expanding Superfund liability." *Hearing on the Impact of Superfund Lender Liability on Small Businesses and Their Lenders Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (1990) (emphasis added). The decision in this case prompted Representative LaFalce to comment that "I fear the day is near when the security interest exemption that Congress enacted as part of Superfund will be rendered meaningless by these expansive judicial decisions." *Id.*

The witnesses who appeared before the committee included bankers, attorneys and representatives of small businesses. The testimony was uniform in demonstrating the negative impact of the unwarranted narrowing of the secured lender exemption. The witnesses indicated that not only were borrowers being denied credit but that some banks faced significant threats to their capital by being named in cleanup actions. Garsson, *Liability Lid for Cleanups Stalls in D.C.*, American Banker, June 8, 1990, at 16 col. 2.

The criticism of the recent court cases and the Congressional reaction has even caused the Environmental Protection Agency (EPA) to rethink its position on lender liability. In testimony on August 2,

James M. Strock, EPA's Assistant Administrator for Enforcement, stated that "we believe we understand the legitimate concerns being expressed." In addition, Strock noted that "[u]nder our current thinking . . . we believe that where a lender is acting in a custodial capacity in administering and winding down affairs of a borrower . . . actions taken to responsibly manage the property upon learning of any contamination should not trigger liability. Similarly, selling off collateral would not, by itself, trigger liability." *Hearing on H.R. 4494, To amend the Comprehensive Environmental Response Compensation and Liability Act of 1980 to Limit the Liability Under that Act of Lending Institutions Acquiring Facilities through Foreclosure or Similar Means and Corporate Fiduciaries Administering Estates or Trusts Before the Subcomm. on Transportation and Hazardous Materials of the House Comm.on Energy and Commerce*, 101st Cong., 2d Sess. (1990). *See EPA Official Tells House Panel of Shift in Policy Towards Lenders, CERCLA Liability*, 21 Env't Rep. 756 (BNA) (1990).

The EPA has also gone so far as to draft a proposed interpretive rule to define the secured creditor exemption. Though the draft rule has not been officially released for comment, the contents have been widely reported in the trade press. Noah, *EPA Proposal Could Ease Lender Liability*, Wall Street J., October 10, 1990 at B2 Col. 1. Among other provisions in the draft rule is a statement that " 'participation in management' under the nation's Superfund law does not include 'the mere capacity or ability to influence facility operations.' " Kleege, *EPA Easing Its Stance on Lender Liability*, American Banker, October 10, 1990 at 12 col. 1. *See also* Daily Rep. for

Executives at M1 (BNA) (October 11, 1990) (EPA Draft Proposal reprinted in full).

Despite all the machinations by the Legislative and Executive Branches on this issue, there is still need for this Court to grant the petition in this case. The amici respectfully submit that the activity following in the wake of the Court of Appeals' decision is precisely the reason why it is necessary for this Court to speak authoritatively on this issue.

To begin, it is clear that a significant portion of the United States Congress (as reflected by H.R. 4494's 287 co-sponsors) has rejected the decision in the case below. It even appears that the EPA, the agency charged with enforcing the statute at issue, does not support the Court of Appeals' interpretation. While this suggests that the lending community might obtain relief in the near future, the reality of the legislative and administrative processes counsels against optimism.

While members of both the House and Senate have indicated a desire to clarify the scope of the secured lender exemption, it is unlikely that any legislation will be forthcoming before the end of this session of Congress. Any proposed legislation will have to be reintroduced in the 102d Congress and there is no telling how long the process could take or whether it would provide retroactive relief.[4]

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[4] The Court has, in numerous cases, been asked to interpret federal statutes which are being used in ways not originally contemplated by Congress. For example, on the civil use of the federal racketeering law (RICO) this Court has noted that "RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Company,*

The prospects for administrative relief from the EPA may be brighter but the benefits are likely to be narrower than a legislative solution. Although there is a proposed draft rule, there is no indication when, if ever, the rule will be circulated for public comment. Even if a final rule is adopted by the EPA there is some question as to the binding nature of the EPA's interpretation of CERCLA on private parties who seek to recover cleanup costs from lenders. This Court, as the final interpreter of federal statutes, is in the best position to clarify the meaning of *existing* law and return some semblance of certainty to the currently confused state of the law.

CONCLUSION

The Eleventh Circuit's decision in this case has wreaked havoc upon commercial practice and the relationship between secured creditors and their borrowers. The lending community's fear of being liable for environmental response costs has already restricted available credit and increased transaction costs for lenders and borrowers and that will continue to be the case for as long as this decision stands.

Inc., 473 U.S. 479, 500 (1985). In the years since this decision there have been several attempts at civil RICO reform, most recently H.R. 5111, 101st Cong. 2d Sess., 136 Cong. Rec. H4030 (1990) and S.438, 101st Cong 1st Sess., 135 Cong. Rec. S1642 (1989). The fact that legislation may be the most appropriate solution is no guarantee that Congress will act. *See also H.J. Inc. v. Northwestern Bell Telephone Company*, ___ U.S. ___, 109 S. Ct. 2893 (1989) (case illustrating the still festering problems of RICO).

Clarity needs to be returned to this area of the law and we respectfully urge the court to begin the process by granting the Petition for Writ of Certiorari.

Respectfully submitted,

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October 19, 1990

(3)

No. 90-504

In The
Supreme Court of the United States
October Term, 1990

FLEET FACTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE*
BANK OF BOSTON, BANK OF NEW ENGLAND,
CONNECTICUT NATIONAL BANK, FIRST INTERSTATE BANCORP,
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE CO. OF AMERICA,
SHAWMUT BANK, N.A,
TEACHERS INSURANCE & ANNUITY
ASSOCIATION OF AMERICA,
AND TRAVELERS REALTY INVESTMENT CORPORATION
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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October 22, 1990

QUESTION PRESENTED

Whether the express exemption from CERCLA liability for secured lenders, who hold indicia of ownership primarily to protect their security interest, and who do not participate in the management of a facility, can be interpreted to hold secured lenders liable for hazardous waste site cleanups if they neither foreclose on any of the borrower's real property, nor participate in the day-to-day management of the facility but who may have had the authority to get involved in or otherwise influence the hazardous waste disposal decisions if they so chose?

CONSENT OF THE PARTIES

Counsel for Fleet Factors Corporation and the Solicitor General's office on behalf of the United States consented to the filing of this brief in support of the Petition for Writ of Certiorari. Written copies of those letters of consent were filed with the Clerk of this Court at the time the Brief of Amici Curiae was filed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The *Amici Curiae* are directly affected by the decision in this case due to their extensive presence in commercial lending. More specifically their interests are as follows:

Bank of Boston, with headquarters in Boston, Massachusetts, is the largest bank in New England. It is a full service bank with assets in excess of $19 billion in real estate lending as well as inventory, equipment, leasing and accounts receivable lending.

Bank of New England, with headquarters in Boston, Massachusetts, is a major full service bank with substantial

assets in real estate lending as well as inventory, equipment, and accounts receivable lending.

Connecticut National Bank, based in Hartford, Connecticut, is an indirect subsidiary of Shawmut National Corporation, which is also based in Hartford, Connecticut. It is a full-service bank with substantial assets in real estate, as well as inventory, equipment and accounts receivable lending.

First Interstate Bancorp, with headquarters in Los Angeles, California, is as of June 30, 1990, the tenth largest banking organization in the United States, owning 25 banks located throughout the Western United States, which in the

aggregate hold assets of $55.1 billion and operate 1,053 offices. Twenty-two of those banks are full service banks with substantial amounts of real estate lending, as well as inventory, equipment, and accounts receivable lending.

John Hancock Mutual Life Insurance Company, with headquarters in Boston, Massachusetts, is the ninth largest insurance company in the United States. It has more than $32 billion in assets, of which more than $10 billion is in loans secured by mortgages on real estate throughout the nation and more than $10 billion is in loans secured by bonds.

New England Mutual Life Insurance

Company (The New England) is one of the nation's largest diversified financial and money-management institutions, with headquarters in Boston, Massachusetts. It has over $4 billion invested in mortgage loans secured by real estate throughout the country as well as substantial assets secured by inventory, equipment, and other personal property.

The Prudential Insurance Company of America (Prudential), a mutual life insurance company, with headquarters in Newark, New Jersey, includes among its investment activities secured lending on commercial real estate. As of May 30, 1990, Prudential's commercial mortgage loan

portfolio included loans with an aggregate principal balance of approximately $22 billion.

Shawmut Bank, N.A., based in Boston, Massachusetts, is an indirect subsidiary of Shawmut National Corporation which is based in Hartford, Connecticut. It is a full-service bank with substantial assets in real estate, as well as in inventory, equipment, and accounts receivable lending.

Teachers Insurance and Annuity Association of America, based in New York, New York, is the fifth largest life insurance company in the United States and the principal pension provider in the higher education market with over $19 billion

invested in loans secured by mortgages or real estate throughout the United States.

Travelers Realty Investment Corporation, based in Hartford, Connecticut, is a subsidiary of The Travelers Corporation. It manages a real estate investment portfolio of $17 billion.

Together the amici have substantial assets tied up in commercial lending across the United States. They have substantial security interests in real and personal property, including tangibles and intangibles.

INTRODUCTION AND STATEMENT OF THE CASE

The *Amici*, Bank of Boston, Bank of New England, Connecticut National Bank, First Interstate Bancorp, John Hancock Mutual Life Insurance Company, New England Mutual Life Insurance Company (The New England), The Prudential Insurance Company of America (Prudential), Shawmut Bank, N.A., Teachers Insurance and Annuity Association of America, and Travelers Realty Investment Corporation adopt and incorporate by reference the Statement of the Case of Fleet Factors Corporation in its Petition for Writ of Certiorari.

The Comprehensive Environmental

Response, Compensation, and Liability Act [CERCLA] 42 U.S.C.A. § 9607(a) (West Supp. 1990) provides that present owners and operators of a vessel or a facility, and owners or operators at the time of disposal of hazardous substances, shall be liable for all the response costs to remove and remediate the hazardous substances consistent with the national contingency plan. This has been interpreted to impose strict, joint and several liability on any party that could be considered to be involved in the operation or to have an ownership interest in the property. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. ChemDyne*

Corp., 572 F. Supp. 802 (S.D. Ohio 1983). However, CERCLA has a specific exemption for secured lenders. The term "owner or operator"

> does not include a person, who, without participation in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

CERCLA § 101(20)(A), 42 U.S.C.A. §9601(20)(A) (West Supp. 1990).

In the case at issue, *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), the Eleventh Circuit expressly set a standard interpreting this exemption which greatly expands the situations in which a lender might be found liable. Applying its

new standard, the Eleventh Circuit not only upheld the portion of the District Court's opinion which held that there were material issues of fact as to whether Fleet Factors Corporation ("Fleet") participated in management for one time period, but it also reversed another portion of the District Court opinion, expanding the time periods Fleet might potentially be held liable under CERCLA.

Amici submit that the standard set by the Eleventh Circuit is clearly erroneous and it is having a substantial impact beyond the determination of the interests before this Court. Many lenders are already restricting lending or backing away from troubled

borrowers in anticipation of expanded liability for Superfund cleanups. The result is an impending credit drought for borrowers which will undermine the health and growth of almost every type of business. A subsequent decision by the Ninth Circuit imposes a much different threshold for liability, creating conflict and ambiguity. In addition, there are an increasing number of CERCLA cases in the lower courts, requiring the guidance of this Court on the issue of lenders' liability. Therefore it is of great importance that this Court hear this case to restore certainty to commercial lending.

SUMMARY OF ARGUMENT

This Court should grant the Petition for

Writ of Certiorari of the Fleet Factors Corporation because the issues involved in this case are of extraordinary importance to borrowers and lenders throughout the country. The Eleventh Circuit decision has created a situation of uncertainty and ambiguity which is having an increasingly negative impact on the national and local economies. Any fair reading of the decision below leads to a conflict between the Eleventh and Ninth Circuit interpretations of the secured lender exemption. In addition, the Eleventh Circuit erred on the law by failing to properly analyze Fleet's status as an owner or operator before turning to the exemption and by reading the

exemption in such a way as to make it meaningless. Finally, this Court should grant the Petition because the decision below undermines the policy behind the CERCLA law and is bad public policy in general.

ARGUMENT

I. THE ELEVENTH CIRCUIT DECISION PRESENTS AN ISSUE OF EXTRAORDINARY IMPORTANCE TO COMMERCIAL LENDERS ACROSS THE UNITED STATES.

In this case, the Eleventh Circuit went far beyond the facts of the case to set an new, expansive, and extra-statutory standard for lender liability under CERCLA. That court interpreted the statutory exemption for secured lenders in such a way as to

essentially eliminate the protection that lenders believed they had under the exemption, thereby stepping into the legislative role and rewriting the law. The result of this decision has been an immediate and serious negative effect on lending practices and the economy throughout the United States.

The *Amici*, all of whom are major commercial lenders, assert that this decision raises the specter of virtually unlimited liability for lenders for hazardous waste site cleanup. In response to that decision, some lenders have already changed their lending practices, others are seriously considering making changes. The first change is a

significant curtailment in making loan commitments to any commercial enterprise, particularly small businesses, which might develop a hazardous substance problem. The second change is an increased reluctance to assist troubled borrowers in a workout situation if there is any potential of a hazardous waste problem. Together these changes will have an increasingly negative effect on the national and local economies. Ultimately they will undermine the purpose of CERCLA as fewer businesses will have the funding available to clean up hazardous waste problems.

Prior to the *Fleet Factors* case, the standard set forth in *United States v.*

Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985), was widely followed. *Fleet Factors*, 901 F.2d at 1556 (Court refers to the *Mirabile* test and cites other lower court cases which followed it: *United States v. New Castle County*, 727 F.Supp. 854, 866 (D. Del. 1989); *Rockwell International v. IU International Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill. 1988); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1204-05 (E.D.Pa. 1989); *Guidice v. BFG Electroplating and Manufacturing Co.*, 732 F.Supp. 556 (W.D.Pa. 1989)). Under that standard a secured lender could remain within the secured lender exemption if it provided some financial advice to a troubled

borrower so long as it did not become involved in day-to-day management of the company. *Mirabile*, 15 Envtl. L. Rep. at 20995. That was a more workable standard for lenders. It gave them some idea of what action they might take to protect their security interest without losing their statutory protection.

The Eleventh Circuit decision was the first federal appeals court review of the secured lender exemption. In it, a quorum of the appellate court panel, consisting of one appeals court judge and a senior district judge sitting by designation,[1] set forth a

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[1] This case was argued before a panel consisting of Circuit Judges Vance and Kravitch and Senior (continued...)

standard for determining lender liability that is far more expansive than the standard that had generally been followed previously:

> *A secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.* It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable –although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, *a secured creditor will be liable if its involvement with the management of the facility is*

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[1] (...continued)
District Judge Lynne of the U.S. District Court for the Northern District of Alabama, sitting by designation. Judge Vance died prior to a decision on the case. The case was decided by Circuit Judge Kravitch and Senior District Judge Lynne.

> *sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.*

Fleet Factors, 901 F.2d at 1557-8 (emphasis added).

Because any standard loan documents will give the secured creditor the potential "capacity to influence the corporation's treatment of hazardous wastes," the result is a standard under which it appears that a secured lender may be held liable merely by exercising rights under the loan documents far short of actual control, such as giving advice. For instance, typical loan documents have a clause which provides that the borrower must be in compliance with all applicable laws. Therefore, if the borrower

treats hazardous substances in any way which violates the law, theoretically the lender could call a default on the loan. From that, it could be inferred that the lender could influence hazardous waste decisions. Similarly, lenders typically have a right to inspect the premises under the loan documents. It is conceivable under the Eleventh Circuit standard that merely entering into the loan agreement with such "compliance-with-law" or "right to inspect" clauses and other clauses giving the lender some control of the business in the event of default could be sufficient participation in the facility's financial management for a lender to be held liable. The clear

implication of the standard is that a lender cannot give a troubled borrower any advice or take any action other than asking for repayment of the loan without opening itself to liability for the cost of the entire hazardous waste site cleanup.

The Eleventh Circuit ignores or misunderstands the nature of secured lending. Secured lenders are not owners of the business. They take a security interest in real or personal property and have certain rights under the loan documents in order to be able to lend money, for which they are typically fiduciaries, with some degree of safety. By making it more risky for lenders to take a security interest than

not, the Eleventh Circuit standard undermines the concepts that underlie this realm of financing.

This expansion of liability from the "day-to-day management" standard of *Mirabile* to the "inference that [the lender] could affect hazardous waste disposal decisions if it so chose" standard of *Fleet Factors* has led to tremendous uncertainty in the lending community as to what, if anything, a secured lender may do to protect its security interest without potentially incurring liability far beyond the scope of the loan. As the Eleventh Circuit was the first Court of Appeals to address this issue and the recent Ninth Circuit decision in *In re*

Bergsoe Metal Corp., 910 F.2d 668, 31 ERC 1785 (9th Cir. 1990) fails to clearly repudiate this standard or to give clearer guidelines, the lending community feels that there is a serious danger that lower courts and possibly other circuits may follow the *Fleet Factors* standard.

The degree of concern the lending community is experiencing over this decision is reflected in the commentary concerning the case. "In a case of first impression, the U.S. Court of Appeals for the Eleventh Circuit May 23 broadened secured creditor liability under the superfund law, specifically rejecting a narrower formulation known as the *Mirabile* rule." *Secured Creditor*

CERCLA Liability Expanded as Appeals Court Rejects 'Mirabile' Approach, Toxics Law Reporter (BNA) Vol. 5, No. 1 at 16 (June 6, 1990). "Lenders already know they must be 'very cautious' in accepting land as collateral,' [Bradley S.] Tupi said. Now, they will have to expect attorneys to advise them that when a loan 'looks like it is going sour, they are in a no-win situation. They should just walk away and not get involved in the borrower's business.'" *Id.* at 17, *quoting* an attorney with the Pittsburgh firm of Reed Smith Shaw & McClay. "A recent federal court ruling--*U.S. v. Fleet Factors Corp.*--delivers a new and potentially devastating blow to banks. The ruling

drastically expands 'lender liability' under the Superfund law...." Connolly, Wall St. J., Aug. 28, 1990 at A10.

In summary, the effects of this case are being felt far beyond the confines of the Eleventh Circuit. Many lenders, who do not take an equity risk in businesses and who consequently do not receive an equity return on their investment, feel they cannot in good conscience expose their institutions to potential liability far in excess of the loan they made. Given the general uncertainty generated by the Eleventh Circuit's decision, the lending community is responding to the potential for CERCLA liability by changing lending practices to the detriment of the

economy.

II. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH A NINTH CIRCUIT DECISION ON THE SECURED LENDER EXEMPTION.

In August 1990, the Ninth Circuit addressed the scope of the secured lender exemption in the *Bergsoe* case. *In Re Bergsoe*, 910 F.2d 668 (9th Cir. 1990). The case involved a public authority which held nominal title to a plant at which a hazardous waste problem arose. The Ninth Circuit cited the standard set forth in *Fleet Factors* and noted that it (the Ninth Circuit) would "leave for another day the establishment of a Ninth Circuit rule on this difficult issue." *Id.* at 672. However, the

Ninth Circuit then went on to say that it is clear from the statute that while the precise parameters of "participation" were undefined, "there must be *some* actual management of the facility before a secured creditor will fall outside the exception." 910 F.2d at 672.

The Ninth Circuit purports to avoid setting a standard for what participation will put a secured lender outside the exemption. But, in fact, by requiring as a minimum "some actual management of the facility," it is setting at least a threshold standard that conflicts with the Eleventh Circuit opinion. Under the Eleventh Circuit decision, a court may *infer* that a secured lender could affect hazardous waste

disposal decisions if it so chose, from the fact that the lender participated in financial decisions to some degree. As stated in the previous section, standard loan provisions in and of themselves seem to give a lender sufficient authority to affect hazardous waste disposal decisions if it so chose.

The *Bergsoe* court specifically rejects financial participation such as negotiating and encouraging the building of the facility; the right to inspect the premises and to take possession upon foreclosure; and participation in an agreement for a change in management during a workout, as bases for holding the secured creditor liable. *Bergsoe*, 910 F.2d at 672. In contrast the

Fleet Factors decision suggests that even remote participation in financial matters, coupled with the authority to influence hazardous waste disposal, is sufficient to find liability.[2]

Not only does the *Fleet Factors* decision conflict with the Ninth Circuit decision, but as the Eleventh Circuit noted itself in the *Fleet* opinion, it is a distinct departure from the series of cases in which lower courts

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[2] The Ninth Circuit gives the Eleventh Circuit decision the benefit of the doubt when it notes, "As did the Eleventh Circuit in Fleet Factors, we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes." Bergsoe, 910 F.2d at 673, n. 3. It is clear, however, from reading the cases in their entireties that the Ninth and Eleventh Circuits have very different views as to what constitutes the exercise of actual management authority.

over the past five years followed the *Mirabile* standard of secured lender liability, requiring actual foreclosure or day-to-day management before a secured lender would be held liable. *Fleet Factors*, 901 F.2d at 1556. That line of cases had created some parameters within which lenders felt it was safe to act. The Eleventh Circuit decision has undermined any certainty that lenders may have felt they gained from these cases.

III. THE STANDARD FOR SECURED LENDER'S LIABILITY SET FORTH BY THE ELEVENTH CIRCUIT IS CLEARLY ERRONEOUS.

The Eleventh Circuit decision is clearly erroneous for a number of reasons. First, the court did not properly address the

question of whether Fleet was an "owner or operator" before moving to consideration of the exemption. Second, the court rewrote the language of the statute as to when liability may be imposed on a lender, interpreting the secured lender exemption in such a way as to make it virtually meaningless.

CERCLA holds those people who are owners and operators liable for the costs of responding to a hazardous waste site problem. The statute then exempts from liability secured lenders who are primarily protecting their security interest and who do not participate in management. As a threshold matter, a court must determine

whether a lender should be considered an owner or operator and then move on to whether the lender is protected by the exemption. In *Fleet Factors*, the court did not make a finding that Fleet was an owner or operator before moving on to consider whether it could benefit from the exemption. The court specifically notes that while it might have found Fleet liable as an operator it was forgoing the operator analysis in this opinion. *Fleet Factors*, 901 F.2d at 1556, n. 6. The court did say that there was no dispute that Fleet held indicia of ownership, so that it would proceed to an analysis of Fleet's participation in management. *Id.* at 1556. The result ignores previous case law

which did not deem a lender an "owner" until it actually foreclosed on its interest. *See United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573, 579 (D. Maryland 1986); *Guidice v. BFG Electroplating and Mfg. Co. Inc.*, 732 F. Supp. 556, 562-3 (W.D. Pa. 1989). In *Mirabile* a bank was held to be exempted from liability even though it actually foreclosed on the property. 15 ELR at 20,996. Similarly, in *Bergsoé* the local authority which held nominal title to the property was held not to be an owner for purposes of CERCLA liability. 910 F.2d at 671. The court may have simply assumed that Fleet was an "owner" because Georgia

is a state in which mortgagees are title holders. However, this assumption would lead to varying interpretations from state to state and it still does not square with *Bergsoe*.

In *Fleet*, the court jumped to the language of the exemption to find potential liability, using the exemption as a weapon rather than a shield. The Eleventh Circuit erred in not squarely addressing the question of whether or not Fleet was an owner or operator, before determining how the exemption applied.

The Eleventh Circuit is guilty of exactly what it accuses the District Court of doing--ignoring the plain language of the statutory

exemption for secured lenders in such a way as to render it virtually meaningless. *Fleet*, 901 F.2d at 1557. The Eleventh Circuit cites the "overwhelmingly remedial" goal of CERCLA in coming to its expansive scheme of liability for lenders (*id.*), but Congress would not have included this exemption in the statute if they had not intended for it to provide some protection to lenders beyond that afforded other owners and operators.

Further, the court departed from previous cases and created further ambiguity by failing to recognize the distinction between the lender's actions with respect to real and personal property.

IV. THE ELEVENTH CIRCUIT DECISION UNDERMINES THE BASIC PURPOSE OF CERCLA AND IS BAD PUBLIC POLICY.

The decision undermines the basic purposes of CERCLA. As lending institutions restrict loans to any businesses that might have a hazardous waste problem and particularly as lenders become unwilling to assist a borrower in a workout situation, there will be less funding available for private parties to clean up hazardous waste sites. The result will be delays and a greater drain upon the public monies in the Superfund. Lenders have neither the experience nor the desire to stand over the shoulder of their borrowers to make sure

that each and every decision the borrower makes with regard to hazardous substances is correct.

The decision below presents lenders with a Hobson's Choice. They may either stay completely uninvolved with the borrower, risking their security interest but avoiding CERCLA liability, or they may get involved to the point of almost running the business in order to meet the role set out for them in *Fleet Factors*, but thereby almost certainly becoming liable for even an accidental spill. The latter role is one which lenders do not have the capacity or expertise to undertake. Under the Eleventh Circuit standard a concerned lender that does ask a borrower

for a periodic accounting in connection with hazardous waste substances could thereby become subject to CERCLA liability. Therefore, the net result of the standard is to encourage lenders to distance themselves from borrowers' operations, particularly if there is any indication that a hazardous waste problem may be arising. Simply stated, the *Fleet Factors* rule does not accomplish its stated purpose of encouraging lenders to police the actions of their borrowers.

The police function which the Eleventh Circuit would assign to lenders is far more appropriately assigned to the government which has various state and federal

regulations to deal with the treatment of hazardous materials, the expertise to enforce those regulations, and the ability to impose criminal sanctions if necessary.

Finally, the tremendous uncertainty and ambiguity that have resulted from this decision have had a serious negative impact on the relationship between borrowers and lenders that ultimately is bad for the economy. That result was not intended by the legislature.

CONCLUSION

For the reasons stated in this brief, the *Amici Curiae* request this Court to grant the writ of certiorari to review the judgment of

the Eleventh Circuit filed by the Fleet Factors Corporation.

BANK OF BOSTON, BANK OF NEW ENGLAND, CONNECTICUT NATIONAL BANK, FIRST INTERSTATE BANCORP, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, SHAWMUT BANK, N.A., TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, TRAVELERS REAL ESTATE INVESTMENT CORPORATION

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No. 90-504

In The

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FLEET FACTORS CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

BRIEF AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American College of Real Estate Lawyers is a non-profit corporation organized for the purpose of gathering together lawyers distinguished for their expertise and high standards of professional and ethical conduct in the practice of real estate law, in order, *inter alia*, to improve and reform real estate law and practice and to speak upon matters of interest and importance to real estate law and practice. College members are required to have concentrated their practice in real estate law for a period of not less than ten years. Additional requirements established by the Board of Governors include a demonstrated willingness to devote time to improving real property law, by writing, teaching or participating in organized bar projects. The College has over 700 members from every state and the District of Columbia. They represent owners, borrowers, lenders, purchasers, sellers, institutional investors, developers, in short, those regularly engaged in both pre- and post-closing activities relating to consummating, monitoring in a meaningful way, and working out secured loan transactions involving both real and personal property.

The College is interested in this case because it substantially impacts secured creditor investment and loan portfolio administration decisions. The decision below established a new classification of liability for secured creditors that precludes consistent, uniform and coherent loan administration and loan initiation decisions.

The Eleventh Circuit has established a new test as to when one holding indicia of ownership primarily to protect his security interest participates in management sufficiently so as to lose the statutory exemption afforded secured creditors under CERCLA.

Because of the hundreds of thousands of secured lending transactions each year throughout the country, it is imperative that this unwarranted standard not be permitted to stand. The College believes that this Court's review of the decision below is essential if the dual goals of environmental due diligence and making credit available to the nation's borrowers are to be met.

The College believes that clarification by this Court of the circumstances whereby a secured creditor may incur liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is essential in order to eliminate the chilling effect of the decision below on the availability of credit to the nation's borrowers. For that reason, the College submits this brief in support of the Petitioner.

SUMMARY OF ARGUMENT

The Eleventh Circuit in the case at bench departed from established district court precedent and a reasonable construction of CERCLA's secured creditor exemption when it formulated a new standard for determining when a secured creditor participates in management so as to become liable under CERCLA as an owner or operator. That court held that it is not necessary for a secured creditor actually to involve itself in the borrower's day-

to-day operations or to participate in management decisions relating to hazardous waste in order to be liable. Rather, the court held that a secured creditor will be liable if an inference can be drawn from the secured creditor's involvement with the borrower's business that, if the secured creditor so chose, it could affect its borrower's hazardous waste disposal decisions, or, as the court put it another way, that the secured creditor will be liable if it has the capacity to influence the borrower's treatment of hazardous waste, even if there is absolutely no proof whatsoever that it exercised that capacity or that its management activities, indeed, resulted in influencing the borrower's treatment of hazardous waste.

This radically expansive new threshold for the exemption's availability has sent a shock wave throughout the country because, to say the least, the distinction between those lending activities that CERCLA exempts and those that will subject a secured creditor to liability are now virtually indistinguishable in the Eleventh Circuit.

Moreover, because of the Ninth Circuit's subsequent decision in *In re Bergsoe Metal Corp.*, 910 F.2d 688 (9th Cir. 1990), which directly conflicts with the case at bench, lenders and borrowers, large and small, throughout the county, are faced with a Hobson's choice regarding what they can or should do or avoid in order to qualify for the protection intended by Congress. Clear, predictable, fair, uniform and rational rules should exist for borrowers and lenders affected by the broad reach of CERCLA liability.

The decision below would inject an unwarranted new standard as to when a secured creditor may be liable for

CERCLA response costs, a standard well beyond that intended by Congress. It is an extremely important issue that requires resolution by this Court.

ARGUMENT

I. THE ELEVENTH CIRCUIT ERRED IN HOLDING THAT A NON-FORECLOSING SECURED CREDITOR MAY INCUR SECTION 9607 (a) (2) CERCLA LIABILITY MERELY ON THE BASIS OF A CAPACITY TO INFLUENCE A BORROWER'S TREATMENT OF HAZARDOUS WASTES.

A. The Eleventh Circuit has created a standard for CERCLA liability inconsistent with and exceeding the statutory liabilities established by CERCLA.

To the extent that any "safe harbor" from CERCLA liability exists, it is embodied in the secured creditor exemption construed by the Eleventh Circuit in *Fleet Factors Corp. v. United States of America*, 901 F.2d 1550 (11th Cir. 1990), the Ninth Circuit in its more recent *Bergsoe* decision, and earlier district court decisions which generally stand for the proposition that lenders are not liable for cleanup costs so long as they do not foreclose and do not participate in the day-to-day operations of the secured facility. *See United States v. Mirabile*, No. 84-2280 (E.D. Pa. Sept. 6, 1985); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); and *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989).

Prior to *Fleet*, the cases had held that the management activities of secured creditors must be relatively

significant before the CERCLA exemption would not be available. In stating that "the critical issue is whether *Fleet* participated in management sufficiently to incur liability under the statute," and that "In order to achieve the 'overwhelming remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms[1] should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities," the court held that:

> Under the standard we adopt today, a secured creditor may incur . . . liability, without being an operator, by *participating* in the *financial* management of a facility *to a degree indicating* a *capacity to influence* the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor *actually* to involve itself in the *day-to-day* operations of the facility in order to be liable – although such conduct will *certainly* lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to *participate* in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its *involvement* with the management of the facility is *sufficiently broad* to *support* the *inference* that it *could* affect hazardous waste disposal decisions *if it so chose* . . . . Nothing in our discussion should preclude a secured creditor from *monitoring* any aspect of a debtor's business. Likewise, a secured creditor can become involved in *occasional and discrete financial decisions* relating to the protection of its security interest without incurring liability.

901 F.2d at 1557-58 (emphasis added). One of the few, if not the only, hints the court gave regarding what the

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[1] The College respectfully suggests the absence of such perceived ambiguity.

particular terms used in its new standard mean is found in the first sentence of footnote 13 on p. 1559 of the opinion,[2] and it is as undefined as the phrase "capacity to influence" is itself.

Respondent contended that Fleet was liable for response costs as either a "present owner and operator of the facility," relying on 42 USC §9607(a)(1), or as the owner or operator of the facility at the time the wastes were disposed of, relying on 42 USC §9607(a)(2). The court rejected the claim for liability as a "present owner and operator," applying rules of statutory construction and concluding that imposing liability on this basis would "torture the plain statutory meaning." *Fleet*, 901 F.2d at 1555. Curiously, the court views the statute as having "plain . . . meaning" and also labels it "ambiguous."

Nevertheless, the Eleventh Circuit proceeded to engage in just such a torture of plain statutory meaning when it concluded that liability could arise under 42 USC §9607(a)(2) for a secured creditor, *without being an operator*, by "participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." *Fleet*, 901 F.2d at 1557. As the Petitioner properly acknowledges in its petition, the decision below creates a "new class" of liable parties under §9607(a)(2), a class which does not require any participation in day-to-day operations of a

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[2] "Generally, the lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement in the facility's financial management." 901 F.2d at 1559 n.13.

facility, but instead merely depends on participation in "financial management" to a degree indicating a capacity to influence how hazardous wastes will be treated, and a class unsupported by the statutory provisions of CERCLA or by its legislative history.

Fleet does not even purport to require a secured creditor to be an "operator" before it could incur §9607(a)(2) liability. Instead, liability allegedly is created by participation in the financial management of a facility. The opinion makes clear that liability does not depend on involvement in the "day-to-day" operations of a facility, nor does it require that the secured creditor participate in management decisions relating to hazardous waste. Instead, the court decides that liability can arise for a secured creditor "if its involvement with the management" of a facility is "sufficiently broad to support the *inference* that it *could* affect hazardous waste disposal decisions *if it so chose.*" *Fleet*, 901 F.2d at 1558 (emphasis added). In doing so, as the Petitioner aptly points out, the court "turns the statute on its head by using the exemption to subject lenders to liability rather than to shield lenders from liability."

Notwithstanding the lack of legislative support for this tortured construction, the court contends that such construction is warranted by legislative history, noting particularly the remarks of Representative Harsha, who introduced the exemption:

> This change is necessary because the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate

> in the management or operation *and are not otherwise affiliated* with the person leasing or operating the . . . facility, to the liability provisions of the bill.

Fleet, 901 F.2d at 1558 n. 11 (citing Remarks of Rep. Harsha, *reprinted in* 2 Senate Comm. on Environmental and Public Works, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA* 945 (Comm. Print 1983)) (emphasis in original).

But the court's interpretation overlooks the conjunctive *"and,"* and instead appears to read the explanation as if it were *"or"* The opinion suggests that the use of the word "affiliated" creates a lower threshold for secured creditor liability. Nothing in its history supports the court's conclusion that CERCLA liability for a secured creditor can arise solely through an inference that the creditor could affect hazardous waste disposal decisions if it so chose.[3]

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[3] The opinion also neglects other statutory history of the secured creditor exemption, noted in *Maryland Bank & Trust Co.*, 632 F.Supp. at 579-80, and recently reiterated in *United States v. Nicolet, Inc.*, 712 F.Supp. 1193, 1204 (E.D. Pa. 1989), suggesting that the exemption was only intended to be applicable in those few jurisdictions where a creditor would "hold title" through a deed of trust in order to secure obligations due to it, in contrast to the majority of "lien theory" jurisdictions where the secured creditor possessed only a lien on property and except after foreclosure would never possess any "indicia of ownership." *See generally* H.T. Tiffany, *The Law of Real Property* §1380. If the secured creditor exemption is a basis for "management" and "capability to affect" CERCLA liability where a secured creditor's involvement in a facility's management is "sufficiently broad to support the inference that it

(Continued on following page)

B. The Eleventh Circuit has created a standard for CERCLA liability inconsistent with customary creditors' rights and loan documentation.

The Eleventh Circuit's opinion claims that it was rejecting a literal construction of the secured creditor exemption, urged on it by the government, which would have imposed liability on any secured creditor that participates in any manner in the management of a facility. The basis for this rejection was their belief that to do so would "largely eviscerate the exemption Congress intended to afford to secured creditors." *Fleet*, 901 F.2d at 1556.

Based on experience with a wide array of secured transactions, and with the documentation associated with those transactions, as well as the loan administration growing out of those transactions, the College believes that the Eleventh Circuit's creation of potential CERCLA liability by measuring, through inference, a creditor's capability to affect hazardous waste disposal decisions, results in an even greater evisceration of the exemption.

Most secured transactions involve numerous documents. While the specific instruments will vary from jurisdiction to jurisdiction, and will also change according to the underwriting policies of the lenders involved, it is not at all unusual for most loan agreements, mortgages, lease assignments, deeds of trust and similar

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(Continued from previous page)

could affect hazardous waste disposal decision if it so chose," does this mean that there could be no such liability in any "lien theory" state?

instruments to authorize the creditor to approve the tenants and leases with tenants, to make further advances or disbursement of loan proceeds where the creditor determines that there is a lien claim, tax deficiency or other situation jeopardizing the creditor's secured position, or refusing to advance further loan proceeds if a borrower is in default of covenants and warranties made at the time the loan began.

The College believes that such provisions give creditors the opportunity to affect hazardous waste disposal decisions. For instance, certain types of tenants, such as dry cleaning establishments, photo finishing labs or pharmacies can generate solvent and other toxic waste residues which require disposal. Because of the creditor's right to approve tenant selection and lease terms, some lenders have adopted policies precluding such tenants from participation in a borrower's project. In other instances, the lenders have required strict lease terms, together with documentation or reports to both the borrower and its creditor demonstrating that such tenants are properly disposing of the hazardous waste materials used in their operations. Clearly, to the extent that a creditor is controlling the presence of such tenants and demanding the procedures they will follow in order to assure their compliance with environmental requirements, a creditor has the capability to affect hazardous waste disposal decisions. Indeed, routine loan administration decisions, at least indirectly, demonstrate that secured creditors already participate in the financial management of their borrowers.

Similarly, when a borrower encounters an unexpected contingency on a project, be it a subcontractor cost

overrun, an additional tax lien, or a newly discovered underground tank or old petroleum spill, frequently the borrower comes back to its lender and seeks authorization either to fund such claims from loan proceeds or seeks a modification or additional advance of the loan to cover these unexpected contingencies. Traditional loan documentation gives lenders the right to respond to such requests, and in so doing, at least according to the Eleventh Circuit standard, thereby gives those creditors the capability to affect hazardous waste disposal decisions.

The College is unaware of any way to document the number of instances where creditors' financing documentation creates this capability, or to document the myriad of occasions when it may be exercised. It is clear to the College that if participation in "financial management" of a facility, coupled with a "capacity to influence" treatment of hazardous wastes, is to be the test for secured creditor CERCLA liability, virtually every secured creditor, through reasonable loan documentation and loan administration, now is denied the benefits of the secured creditor exemption. CERCLA's legislative history regarding this exemption does not indicate that Congress intended such a result.

II. THE ELEVENTH CIRCUIT'S DECISION HAS APPLIED A STANDARD FOR HAZARDOUS WASTE LIABILITY THAT DIRECTLY CONFLICTS WITH ESTABLISHED CASE LAW AND WITH THE REASONABLE EXPECTATIONS OF LENDERS AND BORROWERS BASED ON THAT LAW.

The decision below will have a significant impact on secured lending. The nation's lenders, including banks

and institutions which lend to businesses, were already extremely wary of potential CERCLA liability, notwithstanding their resisting foreclosing on non-performing loans and not participating in the management of the borrower's business. Now, not only the nation's traditional lenders, but corporate fiduciaries and agencies of the Federal Government, including the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC") are concerned with the availability of CERCLA's secured creditor exemption.

Before the Eleventh Circuit's decision, as a result of cases set out in both the district court and Eleventh Circuit *Fleet* decisions, there had been a limited, but clear, construction of the operational liability of a secured creditor. Through decisions such as *Maryland Bank and Trust Co.* and *Guidice*, the statutory exemption language had been construed to mean that, prior to foreclosure, a secured creditor would be exempt from CERCLA liability so long as the secured creditor did not participate in managerial and operational aspects of a facility.

Mirabile was the first case to suggest this interpretation, in 1985. There, the Eastern District of Pennsylvania relieved some secured creditor defendants of CERCLA liability because their participation in the affairs of a facility was "limited to participation in financial decisions," explaining:

> participation which is critical [to CERCLA liability] is participation in operational production, or waste disposal activities. Mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability.

Mirabile, slip op. at 3-4.

Prior to *Fleet*, there was little question that a lender could provide financial assistance and isolated instances of management advice without triggering CERCLA liability, so long as it did not participate in the day-to-day management either before or after the business shut down.

The Eleventh Circuit opinion noted cases from the Eastern District of Pennsylvania (*Mirabile*), the Southern District of Texas (*Coastal Casting Service v. Aron*, No. H-86-4463 (S.D. Tex. April 8, 1988)), the Northern District of Illinois (*Rockwell International v. I.U. International Corp.*, 702 F.Supp. 1384 (N.D. Ill. 1988)), the District of Delaware (*United States v. New Castle County*, 727 F.Supp. 854 (D. Del. 1989)), the Southern District of Georgia (*United States v. Fleet Factors Corp.*, 724 F.Supp. 955 (S.D. Ga. 1988)), and the Western District of Pennsylvania (*Guidice*). All of these district courts have applied a standard which creditors have come to rely upon in their loan administration practices. The number of transactions documented accordingly is immense.

In the five years since the standard was first articulated in *Mirabile*, lenders have adjusted their loan administration practices to this requirement. In doing so, they have sought to avoid becoming involved in the operational affairs of their borrowers. Lenders had come to believe that they were complying with what was necessary to avoid CERCLA liability, absent foreclosure and actual participation in the day-to-day operation of their borrowers.

But the Eleventh Circuit rejected that test as "too permissive" and created a new standard by which

availability of the exemption is to be judged. The new test presents secured creditors with even more uncomfortable dilemmas than they had before *Fleet*. If they elect to foreclose on a troubled property, they risk direct liability for the cleanup, without regard to fault, as well as the loss of their investment in the property. If they shy away from this risk, they are transformed into unsecured status for all intents and purposes and may still be liable for cleanup costs. Customarily, at the outset of the loan process, a creditor considers whether to put in protections, such as periodic policing of activities, to ensure that a hazardous waste condition would not arise and, if a condition did arise, that it would not continue. In light of *Fleet*, the mere inclusion of such protections could render a creditor liable. Understandably, creditors will be hesitant to police the activities of their debtors. By deciding not to police the activities of their debtors, creditors risk pollution of their secured interest. Given the decision in *Fleet*, creditors will be less likely to opt to work out the loan, not wishing to risk liability under *Fleet* by further involvement with the property. In many cases, taking steps to foreclose will result in bankruptcy. The effect will be disastrous on an already troubled national economy.

The central issue in *Fleet* became whether the lender could be held liable on any correct reading of the secured creditor exemption for its action after the borrower ceased operations but before the lender foreclosed its interests in the borrower's inventory and equipment. The United States Environmental Protection Agency ("EPA") argued that Fleet participated in the management of the facility and was therefore liable as an owner or operator. EPA alleged, *inter alia*, that Fleet required the borrower to

seek its approval before shipping its goods to customers; dictated when and to whom the finished goods should be shipped; controlled access to the facility; and contracted with the auctioneer to dispose of the fixtures and equipment at the borrower's facility. EPA also alleged that Fleet should be liable for conduct during and after the auction sale, alleging that friable asbestos was knocked loose from pipes during the auction or when the unsold goods were subsequently removed. The Eleventh Circuit held that, if proved, such activities made Fleet liable because "Fleet's involvement in the financial management of the facility was pervasive, if not complete." *Fleet*, 901 F.2d at 1559.

Even, *arguendo*, if Fleet's involvement in the financial management of the facility was pervasive, if not complete, Congress never intended the participation in management aspect of the exemption to be activated unless there was some nexus between the activities and the causing or failure to abate the contamination giving rise to CERCLA liability in the first instance. The mere fact that a secured creditor seeks to protect its security interest by monitoring, albeit in depth, the activities of its debtor so as to mitigate its losses when the loan's performance becomes seriously in doubt or non-existent, should not transform such activities into CERCLA liability for one who has neither caused or facilitated nor failed to abate the existence of hazardous substances on a site involved in a secured credit transaction.

Indeed, the facts in *Fleet* were such that the court below could have said that Fleet participated in management sufficiently to lose the exemption, without announcing its new radically expansive standard (by which to

make such determinations) by dramatically lowering the threshold of participation in the borrower's affairs that may safely be exercised by a lender. The circuit court could have readily found Fleet potentially liable as a prior *operator* during the winding down period by applying the *Mirabile* standard. But the court held: "We . . . specifically reject the formulation of the secured creditor exemption suggested by the district court in *Mirabile*." *Fleet*, 901 F.2d at 1558. *Mirabile* had suggested that activities, such as determining the order in which customer orders were to be filled, demanding additional sales from a facility, supervising operations of a facility, and assisting in certain manufacturing changes or personnel reassignments, could bring a secured creditor outside the protection otherwise available under the exemption.

Instead, the court below adjudged Fleet potentially liable because it "participated in management" sufficiently to lose the exemption. If the participation in management bears no significant relationship or has no essential nexus to the activities CERCLA proscribes, and the *Fleet* test is couched in such imprecise phraseology as "inference," "could" and "if it so chose," there is literally no threshold regarding what a secured creditor can engage in with any degree of safety in order to avail itself of the congressional exemption.

At least Judge Kozinski, speaking for the Ninth Circuit in *Bergsoe*, limited the management activities to actual rather than ephemeral. At least "actual" connotes a close nexus between the proscribed activity and the so-called management that bears on the proscribed activity. As the *Bergsoe* court stated, "Merely having the power to

get involved in management, but failing to exercise it, is not enough." *Bergsoe*, 910 F.2d at 673 n.3. Judge Kozinski also held, "What is critical is not what rights the Port had, but what it did." *Id.* at 672. And, importantly, Judge Kozinski specifically recognized the nexus concept when, speaking for the *Bergsoe* panel, he stated:

> . . . we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction *which results in the discharge of hazardous wastes.*

Id. at 673 n.3 (emphasis added).

Certainly, *Fleet* and *Bergsoe* are in clear conflict – conflict that this Court needs to resolve so that ongoing secured loan transactions may proceed, and without undue interruption.

The Eleventh Circuit's opinion creates secured creditor CERCLA liability through an inference based on some degree of involvement with management of a facility. By contrast, the Ninth Circuit emphasized actual involvement and held that "there must be *some* actual management of the facility before a secured creditor will" become liable. *Bergsoe*, 910 F.2d at 672.

Subparagraph .1(a) of Rule 10 of the Rules of this Court could not have envisioned a more obvious conflict between decisions of different United States courts of appeals. Moreover, pursuant to subparagraph .1(c) thereof, " . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . . "

CONCLUSION

For the "special and important reasons" set forth above, the American College of Real Estate Lawyers respectfully urges this Court to grant the Petition for Writ of Certiorari and review the decision of the United States Court of Appeals for the Eleventh Circuit.

DATED: October 19, 1990.

Respectfully submitted,

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FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-504

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FLEET FACTORS CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS, THE CALIFORNIA LEAGUE OF SAVINGS INSTITUTIONS, GLENDALE FEDERAL BANK, F.S.B., HOMEFED BANK, F.S.B., AND IMPERIAL BANK AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a secured lender is liable under CERCLA for environmental response costs incurred at the borrower's facility, despite the statutory exemption for secured lenders, where the lender neither took legal title to the borrower's property nor participated in the day-to-day management of the facility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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This *amici curiae* brief is filed on behalf of the National Council of Savings Institutions, the California League of Savings Institutions, Glendale Federal Bank, F.S.B., HomeFed Bank, F.S.B., and Imperial Bank with the written consent of all parties to this action.[1] *Amici* urge the Court to grant certiorari in this case.

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[1] *See* Sup. Ct. R. 37.2. Statements of consent are on file with the Clerk of the Court.

STATEMENT OF INTEREST

The National Council of Savings Institutions (the "National Council") is a major trade association headquartered in Washington, D.C. It represents approximately 400 savings banks and savings and loan associations nationwide.

The California League of Savings Institutions (the "California League") is another major trade association. It represents all savings institutions in the State of California.

Glendale Federal Bank, F.S.B. is the nation's fourth largest savings institution. It provides real estate lending and consumer banking services at 235 branch offices in California, Florida, and Washington, and has in excess of $24 billion in assets.

HomeFed Bank, F.S.B. is a federal savings bank with consolidated assets of approximately $19 billion. The bank operates a network of 212 retail banking offices throughout California. Although its primary lending focus is in California, it has lent money throughout the United States in numerous commercial and residential projects.

Imperial Bank is a state, non-member, Federal Deposit Insurance Corporation ("FDIC") insured commercial bank with assets of approximately $3 billion. It is California's tenth largest commercial bank with twelve banking offices throughout the state. Imperial Bank provides real estate construction and permanent loans to commercial as well as residential borrowers.

The members of the National Council and the California League, as well as Glendale Federal Bank, HomeFed Bank, and Imperial Bank, are substantially involved in secured lending. The issue of the proper scope of secured lender liability for hazardous waste cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*

("CERCLA"), is therefore of great significance to the *Amici*.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question under CERCLA: whether a secured lender may be held liable for cleanup costs at a borrower's facility, even though the lender did not participate in the day-to-day management of the site and is thus not an "operator" of the facility. Contrary to every other court to address the issue, the Eleventh Circuit held that a secured lender need not have participated in such day-to-day management to be held liable. Rather, it must simply have had the "capacity to influence" the borrower's management of hazardous waste at the site. Pet. App. 14a. If allowed to stand, the Eleventh Circuit's decision will have severe economic consequences for banks and savings institutions. Such institutions will find themselves confronted with enormous and unanticipated hazardous waste cleanup costs in situations in which they never foreclosed on their security interest and never exercised control. The ultimate consequence will be that these institutions will be reluctant to make loans to companies that may have environmental problems. This Court's review is plainly warranted.

I. THE ELEVENTH CIRCUIT'S DECISION MISREADS THE SECURED CREDITOR EXEMPTION AND CONFLICTS WITH EVERY OTHER CASE TO CONSIDER THE ISSUE

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), identifies the classes of persons who are liable for hazardous waste cleanup costs. These include, *inter alia*, the present "owner" or "operator" of the site and the owner or operator of the site at the time of disposal of hazardous substances. 42 U.S.C. § 9607(a)(1) and (2). CERCLA explicitly defines "owner or operator" to

exempt "a person, who, *without participating in the management of a . . . facility*, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(A) (emphasis added).

In construing the "secured creditor" exemption, the district court below concluded that secured lenders may "provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business . . . ." Pet. App. 28a.

The Eleventh Circuit rejected the district court's standard, concluding that it was "too permissive towards secured creditors who are involved with toxic waste facilities." Pet. App. 13a. Under the standard adopted by the Eleventh Circuit, a lender may be liable for the borrower's CERCLA liabilities "by participating in the financial management of a facility to a degree indicating a *capacity* to influence the corporation's treatment of hazardous wastes." *Id.* at 13a-14a (emphasis added). Stated another way, under the Eleventh Circuit's standard, "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it *could affect* hazardous waste disposal decisions if it so chose." *Id.* at 14a (emphasis added). The court of appeals specifically stated that "[i]t is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable. . . ." *Id.*

The Eleventh Circuit's standard renders CERCLA's secured creditor exemption virtually meaningless. Even if the lender refrains from foreclosing on the borrower's property, and carefully avoids any participation in the operation of the borrower's facility, it may be liable to the United States or private parties for CERCLA cleanup costs merely because it holds a mortgage, lien, or other security interest and exercises—or has the power to

exercise—prudent collateral management in the nature of financial oversight solely to protect that interest. In essence, this means that a lender risks exposure to CERCLA liability virtually any time it makes a secured loan to the owner of a facility where a hazardous substance has been deposited, stored, disposed of, or placed, even where neither the lender nor the borrower was aware of any environmental problem at the time of the loan.

In interpreting the secured creditor exemption, the Eleventh Circuit has seriously misconstrued the language and purposes of Section 101(20)(A). That section, by its terms, was clearly designed to avoid the imposition of either "owner" or "operator" liability on lending institutions that did not engage in "management" of the facility and that acted "primarily to protect [their] security interest in the facility."

Prior to the Eleventh Circuit's decision, every court to address the question had held that day-to-day operational involvement at a borrower's facility was a prerequisite for subjecting a non-foreclosing secured lender to CERCLA liability. The first detailed analysis of the issue was in *United States v. Mirabile*, 15 Envtl. L. Rep. 20994 (E.D. Pa. 1985). The court in *Mirabile* held that, to be liable under the exemption, a secured creditor must participate in the "operational, production, or waste disposal activities" of the corporation. *Id.* at 20995. "Mere financial ability to control waste disposal practices . . . is not sufficient . . . ." *Id.* Put another way, "it must, at a minimum, participate in the day-to-day operational aspects of the site." *Id.* at 20996. Several other cases, including the district court decision below (*see* Pet. App. 28a), have adopted the same approach. *See, e.g., In re T.P. Long Chemical Inc.*, 45 Bankr. 278, 289 (Bankr. N.D. Ohio 1985) (under the secured creditor exemption, a lender must have "participated in the management of the [borrower's] facility" to be held liable);

Guidice v. BFG Electroplating and Manufacturing Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989) (stating that "a mortgagee is exempt . . . under 42 U.S.C. § 9601(20)(A) so long as [it] did not participate in the managerial and operational aspects of the facility").

Most recently, the Ninth Circuit emphasized the need for operational management in order to hold a secured lender liable. *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990). Although the court declined to adopt a precise standard, it noted that "whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the exception." *Id.* at 672 (emphasis in original). According to the court, "[m]erely having the power to get involved in management, but failing to exercise it, is not enough." *Id.* at 673 n.3. Applying that reasoning, the court rejected the argument that simply having "the right 'to direct that hazardous waste be stored properly'" was sufficient to impose CERCLA liability on a secured lender. *Id.* (quoting appellant's brief). While the court did not repudiate the Eleventh Circuit's formulation, there can be little doubt that the two standards are fundamentally at odds. Indeed, the Environmental Protection Agency ("EPA") has itself recognized that *Bergsoe Metal* conflicts with the Eleventh Circuit's decision and that the latter decision is erroneous. *See Draft EPA Rule on Lender Liability (Text)*, IV Inside EPA's Superfund Report No. 22, at 19, 20, 25 ("EPA Draft Rule") (rejecting Eleventh Circuit's standard and, contrary to its position in the court below, proposing *Bergsoe Metal*'s standard of "actual operational participation by the lender").

Thus, the Eleventh Circuit's decision stands alone, unsupported by any other decision and even by the agency charged with enforcing the statute. Review by this Court is necessary to resolve these conflicting approaches.

II. THE ELEVENTH CIRCUIT'S DECISION, IF NOT OVERTURNED, WILL HAVE A SERIOUS EFFECT ON BANKS, SAVINGS INSTITUTIONS, AND POTENTIAL BORROWERS

Few, if any, issues under CERCLA have received greater attention than the question of lender liability for remediating hazardous waste sites.[2] Indeed, although the Eleventh Circuit's decision was rendered only six months ago, it has already been the subject of considerable commentary, most of it sharply critical of the Eleventh Circuit's analysis.[3] It has also been a focus

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[2] A review of the *Index to Legal Periodicals* reveals that more than 35 law review articles have been written on the topic in the past four years. The following are representative: Marzulla & Kappel, *Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act*, 41 S.C.L. Rev. 705 (1990); Dominick & Harmon, *Lender Limbo: The Perils of Environmental Lender Liability*, 41 S.C.L. Rev. 855 (1990); Note, *The Battle Continues: Lenders are Still Searching for Well-Defined Methods to Avoid Hazardous Waste Cleanup Liability*, 19 Stetson L. Rev. 633 (1990); Corash & Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 Sw. L.J. 863 (1990); Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 Yale L.J. 925 (1989); Note, *Viable Protection Mechanisms for Lenders Against Hazardous Waste Liability*, 18 Hofstra L. Rev. 89 (1989); Note, *Hidden Hazards of Hazardous Waste Cleanup Laws: Lenders and Title Insurers Beware*, 18 Cumb. L. Rev. 723 (1988); Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 Harv. J. on Legis. 317 (1988); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 Wis. L. Rev. 139 (1988); Vollmann, *Double Jeopardy: Lender Liability Under Superfund*, 16 Real Est. L.J. No. 1, at 3 (1987); Burcat, *Environmental Liability of Creditors Under Superfund*, 33 Prac. Law. No. 2, at 13 (1987); Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 Banking L.J. 509 (1986); Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 Bus. Law. 1133 (1986).

[3] *See, e.g.*, Kneipper & Hooks, *Don't Turn Assets Into Liabilities: Ways to Limit Environmental Risks*, 5 Com. Lending Rev. No. 4,

of three separate Congressional hearings and the subject of regulatory review by EPA.[4]

A few statistics illustrate the importance of the issue. EPA estimates that there are more than 30,000 hazardous waste sites around the country.[5] According to EPA, the average cleanup cost per site is about $25 million, with costs for some sites estimated as high as $100 million.[6]

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at 3, 7 (1990) ("[T]he broad legal theory set forth in *Fleet Factors* is very troubling"); Ledbetter, 20 Chem. Waste Litig. Rep. No. 3, at 376 (1990); Parenteau & Johnston, *The Big Chill: The Impact of Fleet Factors on Lenders*, 20 Chem. Waste Litig. Rep. No. 3, at 380 (1990); 2 *The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation* § 14.01[5][c], at 14-75 (S. Cooke ed. 1990); Bolstein & Reznick, *Lender Liability After Fleet Factors*, 10 A.B.A. Envtl. L. No. 3, at 1 (1990).

[4] *See Impact of Superfund Lender Liability on Small Businesses and Their Lenders, Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (June 7, 1990) ("June 1990 Hearing"); *Hearing on S. 2827: The Federal Deposit Improvements Act of 1990, and Other Environmental Risks to Lenders, Senate Banking Committee*, 101st Cong., 2d Sess. (July 19, 1990) (transcript on file with Senate Banking Committee) ("July 1990 Hearing"); *Hearing on Lender Liability Under Superfund, House Comm. on Energy and Commerce, Subcomm. on Transp. and Hazardous Materials*, 101st Cong., 2d Sess. (Aug. 2, 1990) (draft minutes on file with the House Committee on Energy and Commerce) ("August 1990 Hearing"); EPA Draft Rule, *supra*.

[5] August 1990 Hearing at 3 (statement of Rep. Luken describing EPA estimates). This estimate includes only inactive sites. If active sites, such as industrial and municipal landfills, are included, the estimated number of sites is more than 300,000. General Accounting Office, *Cleaning Up Hazardous Wastes: An Overview of Superfund Reauthorization Issues*, at 10 (1985).

[6] *See* Geltman, *Rule 10b-5 and RICO: Alternative Remedies for Environmental Liabilities Acquired by Stock Purchase of a Closely Held Corporation*, 26 Hous. L. Rev. 455, 457 n.8 (1989) (citing press coverage); *cf.* Sen. Subcomm. on Superfund, Ocean and Water Protection, *Lautenberg-Durenberger Report on Superfund Implementation: Cleaning Up the Nation's Cleanup Program* (1989), at 40 (noting that EPA staff estimates average cleanup costs of

Many of these hazardous waste sites may involve liability on the part of secured lenders. While the vast majority of sites have not yet been the subject of CERCLA enforcement or remediation,[7] lenders (primarily banks and savings institutions) are or have been involved in approximately three dozen CERCLA lawsuits, and EPA has notified approximately 60 additional lenders of potential Superfund liability.[8] These figures can be expected to escalate substantially over time, as EPA continues to investigate hazardous waste sites and to initiate CERCLA enforcement proceedings. Indeed, one witness at recent Congressional hearings on lender liability testified that the cost of cleanup for banks could exceed $100 billion. August 1990 Hearing at 177-78.

Prior to the Eleventh Circuit's decision, no bank or savings institution could have foreseen the serious risk of exposure to hazardous waste cleanup liability that would result from making ordinary business loans and exercising traditional collateral management. Consequently, such institutions now face the prospect of enormous unanticipated CERCLA liability.

In many cases, this liability could vastly exceed the amount the creditor agreed to lend against the security of the property. Indeed, with average cleanup costs estimated at $25 million per site, *see* page 8, *supra*, and with CERCLA providing for joint and several liability, *see, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989), cleanup costs will often exceed the fair market value of the property, even after full remediation. At a time when many banks and savings institutions already face

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1163 sites listed on the National Priorities List at $18 million per site).

[7] *See* August 1990 Hearing at 3 (statement of Rep. Luken) (noting that cleanup has "begun" on about four percent of the hazardous waste sites).

[8] *See Risks to Lenders—EPA Lists Cases Where Lenders Risk Liability*, IV Inside EPA's Superfund Report No. 21, at 25 (1990).

serious financial difficulties, the imposition of massive Superfund liability could have severe consequences. Although the Eleventh Circuit notes that, in the future, creditors, aware of its decision in this case, will weigh the risk of CERCLA liability in making loans, Pet. App. 15a, this provides little comfort to institutions that made loans prior to its decision. It also does not help in the case of a hazardous waste problem, such as buried waste, that does not become known until years after the loan is made.

Yet another problem for creditors who have already made loans arises when the borrower encounters financial difficulty. In the past, a typical creditor would actively assist its borrowers in assessing their finances and working out their financial setbacks. This practice, known as "collateral management," is beneficial both to creditors and borrowers, and is often used with small businesses. Under the Eleventh Circuit's decision, however, the prudent lender would be virtually obligated to follow a "hands-off" approach and avoid helping the borrower. Any degree of involvement in the affairs of the borrower could constitute evidence of a "capacity" to influence hazardous waste decisions, and thus subject the creditor to massive cleanup liability.

The Eleventh Circuit's decision, if not overturned, will have a serious impact not only on creditors who have already made loans but also on the future course of lending activity. As a practical matter, lenders will have little choice but to deny financing if there is any possibility that the prospective borrower's site may be subject to CERCLA liability. No reasonable lender will feel free simply to ignore the decision below, even in jurisdictions other than the Eleventh Circuit, since no one can predict whether other circuits will adopt the same standard. This reduction in lending will harm not only lenders but also potential borrowers, many of which are small companies or farmers that may not be able to survive the downturn

in lending. Indeed, the Eleventh Circuit's decision will have the perverse effect of reducing the availability of funds for companies that need to borrow money to address hazardous waste cleanup problems. It will also result in costs to failed and failing savings institutions, costs that may ultimately be borne by the taxpayers.

The reason the Eleventh Circuit's decision will lead to a decline in lending activity is simple. If financial institutions lend money without taking steps to protect their security investment—such as monitoring the company's financial records—they run a great risk in the event of a default. On the other hand, under the Eleventh Circuit's standard, it is all but impossible for lenders to protect their security interest without incurring CERCLA liability. This is contrary to Congress' purpose in enacting CERCLA, which was primarily to impose cleanup costs on "polluters." *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985). Lenders can be held liable even when they did not cause or contribute to contamination at the borrower's site, and even when they exercised the utmost caution to avoid having any role in the operational management of the site.

The Eleventh Circuit urges lenders "to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard." Pet. App. 16a. Yet, it is precisely that sort of day-to-day involvement in a borrower's operations that, under the language of Section 101(20)(A), *disqualifies* a lender from relying on the exclusion. In other words, the Eleventh Circuit would require a lender to do precisely what would deprive it of the benefit of the secured creditor exemption. The only way to avoid these risks is to refuse to provide loans if there is any question of potential CERCLA liability.

These serious consequences of the Eleventh Circuit's decision are neither speculation nor hypothetical situations. Indeed, even prior to the decision, many lenders

were already concerned about the possibility that a court might construe the exemption narrowly. Five examples from the recent Congressional hearings on lender liability illustrate the point.

First, a witness on behalf of the American Bankers Association testified about the results of a recent poll of banks with assets of $250 million or less. According to the witness, 43 percent of the banks responding to the poll have already stopped making loans altogether to small businesses associated with environmental problems, and an additional 11 percent planned to stop making such loans in the future. July 1990 Hearing at 65-66. Second, a bank officer from Ohio, who appeared on behalf of the Ohio Bankers Association, indicated that his bank had recently amended its loan policy to classify as "undesirable" loans to businesses with high risk environmental implications. August 1990 Hearing at 120. Third, the president of the New York State Bankers Association testified that a bank had to withdraw from a deal involving $50 million of financing because of CERCLA concerns. An environmental audit had been deemed necessary, but since the cost of the audit was $250,000, neither the borrower nor the bank could absorb that cost. June 1990 Hearing at 11. Fourth, a witness testifying on behalf of the National Association of Homebuilders described a situation where, because a chemical company had allegedly dumped hazardous waste on a site, the developer could not obtain financing, even after the developer had shown that in fact there had not been any dumping. August 1990 Hearing at 190. Fifth, representatives of the FDIC stated that the Eleventh Circuit's decision could lead lenders to become less involved in the borrowers' financial affairs, a consequence that would conflict with the FDIC's goal of furthering the soundness of the country's financial system. *Id.* at 89-90.[9] As these

[9] The Eleventh Circuit standard also undermines federal banking requirements applicable to federally regulated depository institutions. Such institutions are required to "meet the credit needs of

examples illustrate, the Eleventh Circuit's decision will have substantial economic effects.

III. REVIEW IS ESSENTIAL AT THIS TIME

While there are only two court of appeals decisions addressing the issue in this case, review at this time is clearly warranted. The issue has already been addressed by several district courts and by numerous commentators, and there is little benefit to be gained by waiting for additional court decisions. Moreover, there is no immediate prospect of legislative or regulatory action. The major bills that Congress has proposed to clarify the lender liability provision were not even reported out of Committee before Congress recessed.[10] While the EPA has written a draft rule on the subject, *see* EPA Draft Rule, *supra*, that draft has been under review by the Office of Management and Budget ("OMB") for months, 21 Env't Rep. (BNA) No. 25, at 1173 (1990), and there is no way to predict when a final regulation will be pro-

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their . . . communities . . . ." Community Reinvestment Act of 1977 ("CRA"), 12 U.S.C. § 2901 *et seq.* *See also* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, at 527.

[10] *See, e.g.*, H.R. 4494, 101st Cong., 2d Sess. (1990) (introduced by Rep. La Falce, referred on April 4, 1990 to House Committee on Energy and Commerce); S. 2827, 101st Cong., 2d Sess. (1990) (introduced by Sen. Garn, referred on June 28, 1990 to Senate Committee on Banking, Housing, and Urban Affairs); S. 2319, 101st Cong., 2d Sess. (1990) (introduced by Sen. Garn, referred on March 23, 1990 to Senate Committee on Environment and Public Works). Indeed, immediately before adjourning, Congress reauthorized the Superfund program without enacting any provision dealing with lender liability. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 3-Year Extension of Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 104 Stat. 1388. For this reason, there is now speculation in the financial community that the possibility of corrective lender liability legislation is "greatly diminished." Wall. St. J., Nov. 5, 1990, at B6, col. 1-2.

mulgated.[11] Finally, even if Congress or EPA takes action in the lender liability area, there is no assurance that the statute or rule that ultimately emerges will address the problems posed by the Eleventh Circuit's decision.

The Eleventh Circuit's decision squarely presents the issue of the proper standard for determining lender liability under CERCLA. Even EPA does not seriously dispute that the standard adopted by that court is erroneous. This Court should grant certiorari and resolve the issue now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 13, 1990

[11] To illustrate the potential for delay, a major hazardous waste cleanup rule under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*, that EPA sent to OMB did not receive OMB approval for 21 months. *See* 21 Env't Rep. (BNA) No. 10, at 427 (1990).